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## Trammel v. United States: Bad History, Bad Policy, and Bad Law

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**TRAMMEL v. UNITED STATES: BAD HISTORY, BAD POLICY, AND BAD LAW**

*Michael W. Mullane*

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## TRAMMEL v. UNITED STATES: BAD HISTORY, BAD POLICY, AND BAD LAW

Michael W. Mullane\*

[W]e think it time to acknowledge what is now . . . compellingly clear: the case was a mistake. We do not lightly reconsider a precedent, but, because [it] contradicted an "unbroken line of decisions," contained "less than accurate" historical analysis, and has produced "confusion," we do so here.<sup>1</sup>

In 1980 the United States Supreme Court decided *Trammel v. United States*.<sup>2</sup> The opinion changed the Spouses' Testimonial Privilege, overturning centuries of consistent case decisions. The Court based its decision on the history and effect of privilege<sup>3</sup> and a straw poll of state legislative and court decisions on the issue.<sup>4</sup> The Court concluded its decision would permit the admission of more spousal testimony without impairing the benefits the privilege was supposed to confer on spouses. The Court's decision in *Trammel* was wrong on three counts. The first was bad history overlaid with questionable analysis. The survey of the state's treatment of the privilege was done in recognition of the longstanding federal tradition of abstaining from the regulation of marriage and family matters in favor of the states' regulation. Today, the United States Congress and Executive Branch view marital and family issues as legitimate areas for federal regulation and control. The Court's conclusion that the change mandated by its decision would preserve the underlying goal of the Spouses' Testimonial Privilege simply ignored the reality of the modern criminal justice system. Finally, it appears the Court's decision was based on a view of the family's future that has been overtaken by subsequent events.

All evidentiary privileges are based upon the recognition of social values extending beyond the Court's desire to have access to all available evidence when deciding a case. Privileges are granted only where the costs and benefits entailed in obtaining and using the evidence are outweighed by the benefits and costs to some other social value. Absent from the Supreme Court's analysis was any meaningful attempt at balancing the need for evidence against the social

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1. *United States v. Dixon*, 113 S. Ct. 2849, 2864 (1993) (quoting *Soloria v. United States*, 483 U.S. 435, 439, 442, 450 (1987)) (overruling *Grady v. Corbin*, 495 U.S. 508 (1990)) (footnote omitted).

2. 445 U.S. 40 (1980).

3. *Trammel v. United States*, 445 U.S. 40, 43-44, 52 (1980).

4. *Id.* at 48-50.

costs of obtaining the evidence. The *Trammel* decision was seriously flawed when written. Its premise has been rendered moot by subsequent political developments. The case is ripe for reconsideration and reversal.

The *Trammel* decision decreed a single change to the Spouses' Testimonial Privilege, one of two evidentiary privileges protecting the marital relationship.<sup>5</sup> The other evidentiary privilege protecting the marital relationship is the Marital Communications Privilege.<sup>6</sup>

The confines of the Marital Communications Privilege are easy to describe. First, the privilege extends only to words or acts intended as communication to the other spouse . . . . Second, it covers only those communications made during a valid marriage . . . unless the couple had irreconcilably separated . . . . Third, the privilege applies only to those marital communications which are confidential. That is, the privilege does not extend to statements which are made before, or likely to be overheard by, third parties . . . . Marital communications are presumptively confidential . . . .<sup>7</sup>

The Spouses' Testimonial Privilege is not confined to confidential communications. It precludes compelling a witness to give testimony adverse to his or her spouse, regardless of the subject matter, source, or time when the information was gathered. Thus the Marital Communications Privilege resembles the Attorney-Client, Doctor-Patient, and other privileges concerned only with protecting the confidentiality of communications within certain relationships. The Spouses' Testimonial Privilege is analogous to the Privilege against Self-Incrimination.

Until *Trammel*, either spouse could assert the Spouses' Testimonial Privilege. Unlike the Marital Communications Privilege, however, the Spouses' Testimonial Privilege does not survive the end of the marriage.<sup>8</sup>

The two marital privileges differ in both application and scope. The Marital Communications Privilege applies to any testimony about private communications between spouses, whether or not its revelation might be adverse to either spouse. Furthermore, secrets

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5. The Advisory Committee's Note to proposed Federal Rule of Evidence 505 identifies two Spouses' Testimonial Privileges: one privilege for the party spouse and another for the witness spouse. Most commentators and courts, however, see this as a single privilege jointly held by both spouses. See generally IV 8 WIGMORE ON EVIDENCE §§ 2227-2245 (McNaughton rev. 1961). The Supreme Court in *Trammel* spoke of modifying a singular privilege, as opposed to eliminating one of two privileges. *Trammel v. United States*, 445 U.S. 40, 48-53 (1980).

6. The Spouses' Testimonial Privilege and the Marital Communications Privilege are also known by other names, but these designations shall be used throughout this article.

7. *United States v. Marashi*, 913 F.2d 724, 729-30 (9th Cir. 1990) (citations omitted).

8. See *Hawkins v. United States*, 358 U.S. 74 (1958).

told a spouse during a marriage remain protected even after the marriage has ended.<sup>9</sup>

The Spouses' Testimonial Privilege is different on both counts. This privilege applies only to testimony adverse to the non-witness spouse and is available only during the marriage. On the other hand, the protection of the Spouses' Testimonial Privilege is not limited to confidential communication. It protects all adverse testimony, regardless of the source of the witness's knowledge.<sup>10</sup>

The following chart may prove useful.

Attribute	Spouses Testimonial Privilege*	Marital Communications Privilege
Requires valid marriage	Yes	Yes
Scope	Covers all testimony adverse to the witness' spouse	Covers only testimony about confidential communications
Waivable by	Both spouses only*	Either spouse**
Matters occurring before marriage	Covered	Not Covered
Privilege survives the marriage	No	Yes

\* At common law, before *Trammel*

\*\* Some jurisdictions vest the privilege only in the spouse who made the confidential statement.

### I. WE HAVE MET THE ENEMY AND HE IS US<sup>11</sup>

The decision in *Trammel* marked a shift in the Supreme Court's perception of the societal value of marriage and family on the one

9. See, e.g., *United States v. Lustig*, 555 F.2d 737, 747 (9th Cir. 1977) (Marital Communications Privilege may be asserted by the non-witness spouse even after the marriage has ended). But see *United States v. Roberson*, 859 F.2d 1376, 1381 (9th Cir. 1988) (The Marital Communications Privilege does not cover communications made after the spouses had irretrievably separated).

10. The Spouses' Testimonial Privilege applies only to testimony, not to non-testimonial evidence. Appropriately, courts look to the privilege against self-incrimination to determine what is and what is not testimony protected by the privilege. See, e.g., *In re Shelleda*, 666 F. Supp. 196 (D. Colo. 1987) (Fingerprints and handwriting exemplars are not protected because they are not communications). See also Note, *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1570 (1985).

11. *Pogo* by Walt Kelly.

hand and the need for judicial access to "every man's evidence" on the other.<sup>12</sup>

Prior to *Trammel*, the Spouses' Testimonial Privilege prevented anyone from testifying against his or her spouse, if they or their spouse objected. Traditionally, the Spouses' Testimonial Privilege differed from all other privileges in that it was held by two people, either of whom could assert it. Like all privileges, it could be waived, but only if both spouses agreed.<sup>13</sup> The privilege has existed in this form virtually since the beginning of recorded common law.

The decision in *Trammel* stripped the privilege from the hands of the party spouse. In effect the *Spouses' Testimonial Privilege* became the *Spouse's Testimonial Privilege*. Henceforward, only the witness spouse held the privilege. The practical effect of the decision on Mr. and Mrs. Trammel, as well as those who came after, was dramatic. The case sanctioned attempts by the government to induce, if not coerce, the defendant's spouse to testify against her or him. This change rewrote an ancient social contract, striking a new balance between the social importance of law enforcement and the family.

The effect of the Supreme Court's decision in *Trammel* was to declare open season on spouses. Law enforcement has been busy exploiting its new license ever since *Trammel*. The extent and success of federal law enforcement's attempts to turn wives and husbands against each other is difficult to assess. Still, the tip of the iceberg bobs to the surface often enough to cause concern about the mass lurking below the reported opinions.<sup>14</sup> The impact of *Trammel* cuts even deeper into the social fabric. It established a judicial tone

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12. *Trammel v. United States*, 445 U.S. 50 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

13. *Id.* at 46 (citing *Hawkins v. United States*, 358 U.S. 74, 78 (1958) and *Wyatt v. United States*, 362 U.S. 525, 528 (1960)).

14. The Author has been unable to locate any source of statistics or categorization listing cases in which one spouse testifies against another. Since *Trammel* there have been understandably few reported objections to the appearance of a spouse as the government's witness. Such cases can be found, however. *E.g.*, *United States v. LeQuire*, 943 F.2d 1554, 1558 (11th Cir. 1991) (former wife testifies against ex-husband pursuant to agreement with government; it is unclear when the divorce occurred); *United States v. Long*, 917 F.2d 691, 698-99 (2nd Cir. 1990) (wife had "a cooperation agreement with the government under which she agreed to testify [against her husband] in exchange for immunity"); *United States v. Neal*, 532 F. Supp. 942, 944 (D. Colo. 1982), *aff'd*, 743 F.2d 1441 (10th Cir. 1984) (wife cooperated with F.B.I. as immunized government witness by permitting them to tape-record telephone conversations with husband where she asked questions suggested by government and provided subsequent testimony at husband's trial).

Another variant of the ploy is revealed by the Fourth Circuit's unpublished opinion in *United States v. Hernandez*, 912 F.2d 464 (4th Cir. 1990), where the government induced a guilty plea by promising not to prosecute the defendant's wife. Other examples exist. *See also Harman v. Mohn*, 683 F.2d 834, 838 (4th Cir. 1992); *Martin v. Kemp*, 760 F.2d 1244, 1245 (11th Cir. 1985).

that effectively precluded development and recognition of a privilege protecting the parent-child relationship.<sup>15</sup> Today, law enforce-

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There is a significant number of cases denying assertions of the marital privileges on grounds of the "joint participation" exception, holding that the privileges cannot be asserted if the witness was also a participant in the crime. The Tenth Circuit decision in *United States v. Trammel*, 583 F.2d 1166 (10th Cir. 1978), was based upon recognition of this exception as a necessary modification to *Hawkins v. United States*, 358 U.S. 74 (1958). The Seventh Circuit previously acknowledged the exception in *United States v. Van Drunen*, 501 F.2d 1393 (7th Cir. 1974). Notwithstanding the Supreme Court's failure to follow this lead in deciding *Trammel*, the exception has been recognized by several other circuits. Given the broad scope of the law on accessories and co-conspirators, and the assumed privacy and intimacy of most marriages, this approach has proven productive for law enforcement. See *United States v. Walton*, No. 91-5064, 1991 U.S. App. LEXIS 24945 (6th Cir. 1991) (subject to Sixth Circuit Rule 24 limitations on citation as authority); *United States v. Marashi*, 913 F.2d 724 (9th Cir. 1990); *United States v. Byrd*, 750 F.2d 585 (7th Cir. 1985); *United States v. Clark*, 712 F.2d 299 (7th Cir. 1983) (assertion of Spouses' Testimonial Privilege denied on multiple grounds); *United States v. Ammar*, 714 F.2d 238 (3rd Cir. 1983) (involving communications as part of continuing criminal activity and acknowledging joint participation exception); *United States v. Entrekin*, 624 F.2d 597 (5th Cir. 1980) (affirming on other grounds the district court's application of the Joint Participation Exception). It is fair to assume that once the marital privilege has been denied on this ground a defendant spouse might be willing to reconsider any plea or other offers held out by government in exchange for his or her cooperation. See also *United States v. Kane*, 944 F.2d 1406, 1412 (7th Cir. 1991) (wife refused offer of immunity to testify against husband, was called by government knowing she would not inculcate husband, and then impeached with a prior inconsistent statement). But see *In re Malfitano*, 633 F.2d 276 (3rd Cir. 1980) (refusing to recognize the exception).

On at least one occasion the post-*Trammel* Spouses' Testimonial Privilege enabled a witness to provide protection for his spouse. See *In re Matthews*, 714 F.2d 223 (2d Cir. 1983) (government grants wife immunity to induce husband's agreement to testify against in-laws). For a less effective instance of post-*Trammel* protection of a marriage, see *In re Ford*, 756 F.2d 249 (2d Cir. 1985) (government avoids privilege by promising to use husband's testimony only against targets other than his wife and to create a "Chinese wall" around his testimony in subsequent investigation and prosecution of his wife).

15. *United States v. Harris*, No. 87-5840, 1988 WL 74154 (6th Cir. July 19, 1988). (refusing to recognize a parent/child privilege, citing *Trammel*; subject to Sixth Circuit Rule 24 limitations on citation as authority); *In re John Doe*, 842 F.2d 244 (10th Cir. 1988) (concerning a fifteen-year-old refusing to testify against his mother and citing *Trammel*); *United States v. Davies*, 768 F.2d 893 (7th Cir. 1985) (denial of child/parent privilege, citing *Trammel*); *United States v. Ismail*, 756 F.2d 1253 (6th Cir. 1985) (son agrees to testify against father in exchange for immunity from prosecution for perjury before grand jury after assertion of child/parent privilege is denied, citing *Trammel*); *United States v. Smith*, 742 F.2d 398 (8th Cir. 1984) (mother has no privilege to refuse to testify against son, citing *Trammel*); *United States v. Jones*, 683 F.2d 817 (4th Cir. 1982) (rejecting a family privilege where witness was emancipated minor, citing *Trammel*); *United States v. Penn*, 647 F.2d 876 (9th Cir. 1980) (refusing to recognize a child/parent privilege where son, age five, was given five dollars to show police where his mother hid heroin during a search of family home, citing *Trammel*); *Port v. Heard* 594 F. Supp. 1212, 1220 (S.D. Tex. 1984) (denial of family privilege asserted by father and step-mother subpoenaed to testify against son at grand jury, citing *Trammel*). However, a family privilege providing

ment appears to have few qualms about inducing children to inform on their parents.

There is a girl named Crystal who lives Downeast in Searsport, Maine. In 1992, she sat in her fifth grade classroom and listened to a police officer explain the DARE program.<sup>16</sup> According to the *Wall Street Journal*, "DARE police . . . teach children about the dangers of drugs [and] also befriend students on the playground and in extracurricular activities." One commentator has noted that "the experience of seeing a uniformed police officer as a loving, caring and concerned human being has to make a tremendously positive impression on the child."<sup>17</sup> All DARE police instructors are trained to encourage students to raise their hand if they know anyone who uses drugs but not to mention any names. After the dangers of drug use are explained to the children, they are encouraged to see the officer after the program if there "is anything troubling them."<sup>18</sup> Crystal listened. She was bothered by what the officer told her. She knew her mom and dad smoked marijuana.

Several days later she was still worried. She decided to see if the police officer could help her. She wanted her parents to stop but had never been able to talk to them about it. According to Crystal, the police officer promised "nothing would happen" to her parents and asked her for more details.<sup>19</sup> She told him about the plant in her mother's closet.

The next day, [the police officer] and two state drug agents interviewed Crystal for about an hour at school. That after-

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protection for confidential communications between parents and children has been recognized. *In re Agosto*, 553 F. Supp. 1298 (D. Nev. 1983). See J. Tyson Covey, *Making Form Follow Function: Considerations in Creating and Applying a Statutory Parent-Child Privilege*, 1990 U. ILL. L. REV. 879, 882-86 (1990) for a brief history of the attempts to develop a parent-child privilege.

Other examples of a clash between family values and government interests include: *United States v. DiMichele*, No. 88-00060, 1989 WL 104947 (E.D. Pa. Sept. 5, 1989) (an unsuccessful attempt to force a convicted husband to testify against his wife in a civil forfeiture action); *United States v. Lofton*, 957 F.2d 476 (7th Cir. 1992) (District Court refused to honor a wife's assertion of the Spouse's Testimonial Privilege based on a finding of waiver by giving a voluntary statement to the police and testimony at a pre-trial proceeding); *In re Larson*, 785 F.2d 629 (8th Cir. 1986) (targets are sisters of witness' wife, dismissed as moot).

16. DARE is an acronym for Drug Abuse Resistance Education. The program is based on a model developed by the University of Southern California. In 1992, 4700 communities participated, reaching almost one fourth of all the grade schools nationally. The program is coordinated by DARE America, Inc., and works through local police departments. Joseph Pereira, *I Would Never Tell Again*, WALL ST. J. (Eastern Edition), Apr. 20, 1992, at A1.

17. WALL ST. J. (Eastern Edition), Apr. 20, 1992, at A7 (quoting Chris Ringwalt, a DARE analyst for the Research Triangle Institute, a private social policy research concern in North Carolina).

18. *Id.*

19. *Id.*



noon, two Searsport police officers and four drug agents converged on [Crystal's] home . . . . Crystal's . . . eight-year-old sister was taken to a next-door neighbor. A few minutes later . . . Crystal was placed in a police car as she got off the school bus and was driven off by police.<sup>20</sup>

The full extent of DARE's success in convincing children to become government informants is difficult to assess, but Crystal's story is not unique.<sup>21</sup>

The Author is a child of the Cold War.<sup>22</sup> For those of my generation, the Pogoesque impact of Mrs. Trammel and Crystal's experiences is unavoidable. During the 1940s and 1950s, the antithetical differences between the societal values of the Free World and the totalitarian regimes of the Nazi Germany and post-war Communist nations were a consistent subject of discussion, education, and propaganda. These distinctions swirled around the West's commitment to protection of individual political rights and privacy as opposed to totalitarian insistence on the primacy of the state.

The Nazis and Communists were certainly blood enemies. Yet they were united in their assertion of the government's right to control everything. They controlled what people were told. They controlled what people could say. They actively attempted to control what people thought. They did this by insisting it was every individual's duty to inform the government about everyone else—including their own families. Husbands were pitted against wives, children against parents and grandparents.

I still can remember, at age ten, trying to imagine how it would be to live like that. As a child, I found the concept of children and

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20. *Id.*

21. Police officers involved in DARE deny such windfalls are the "main purpose" of the program. *Id.* at A1. It is also clear that at least some participating officers have had more than one experience with children informing on their parents. See also *United States v. Penn*, 647 F.2d 876 (9th Cir. 1980) (police officer paid a five-year-old five dollars to show where his mother hid heroin during a search of the family home, citing *Trammel*); James Bovard, *Kids, Cops, and Caseworkers: America's Newest Parent Traps. DARE Scare: Turning Children Into Informants*, WASH. POST, Jan. 30, 1994, at C03; Mike Kaszuva, *Critic's Question Antidrug Program. Is DARE Saving Kids from Drugs or Teaching Glorified Snitch Tactics?*, STAR TRIBUNE, June 7, 1992, at 01B; Joan Abrams, *When a Lewiston Girl Turned in Her Mom, Was It a Victory for Kids and a Campaign, Or An Unwarranted Attack on Parental Authority?*, LEWISTON MORNING TRIBUNE, July 5, 1992, at 1A (eleven-year-old girl who brought a bag of marijuana, drawings of paraphernalia, and a list of reasons why she should and should not turn in her mother and gave them to DARE officer "was perfectly willing to have her mom hauled off to jail," (according to police officer)).

22. The Author's personal experience represents a broad, if unscientific, sampling of primary education in the United States during the period. I entered first grade in 1948 and graduated from high school in 1960. My father was in the military. Between first and twelfth grades I attended ten schools in three states and the District of Columbia. The schools were about evenly divided between public and parochial.

parents sending one another to prison frightening. Even at age ten, I had some sense of the isolation and vulnerability such a betrayal would create. In the late 1970s Alexander Solzenitzyn's *The Gulag Archipelago*<sup>23</sup> was still able to call up the same visceral reaction.

Three years after the United States Supreme Court announced its decision in *Trammel*, Liang Heng and Judith Shapiro published *Son of the Revolution*.<sup>24</sup> The book is Liang Heng's account of growing up in mainland China during the Cultural Revolution. His mother held a responsible job with the Public Security Bureau. She offered criticism of a supervisor as part of the Hundred Flowers Movement. This program of intra-party criticism was followed by the Anti-Rightist Movement. The Author speculates that the first program was a giant testing operation designed to lure Rightists out into the open. In any event, every work unit was given a quota of Rightists to uncover. Heng's mother's name was included on her unit's list. Heng describes the impact on his father.

Just as his wife was being declared an enemy of the Party, Father was actively participating in the Anti-Rightist Movement in his own unit. Father believed in the Party with his whole heart, believed that the Party could never make a mistake or hand down a wrong verdict. It was a tortuous dilemma; Father's traditional Confucian sense of family obligation told him to support Mother while his political allegiance told him to condemn her. In the end, his commitment to the Party won out, and he denounced her. He believed that was the only course that could save the family from ruin.<sup>25</sup>

Heng also tells about the day he read his older sister's "Thought Reports" to the Communist Youth League. "She confessed her weakness in going to see her Capitalist mother, and her determination to overcome such tendencies, saying she hated herself for their past contact. She even said she wanted to renounce all family ties and let the Party be her true father and mother . . ."<sup>26</sup> Crystal would understand.

The decision in *Trammel* was and is bad policy. The symbolic significance of this change is more likely to have a profound impact on our societal values than to produce any benefit from additional convictions. Today the stage is set for the Supreme Court to reexamine the issue and reverse its unsuccessful experiment in futurism.

At the time of the *Trammel* decision, whether and in what form the institutions of marriage and the family might survive were *not* matters of federal concern. Such issues were left to the states. No federal policy on marriage or the family existed. As a result, federal

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23. ALEKSANDR I. SOLZHENITSYN, *THE GULAG ARCHIPELAGO* (1973).

24. LIANG HENG AND JUDITH SHAPIRO, *SON OF THE REVOLUTION* (1983).

25. *Id.* at 9.

26. *Id.* at 38.

courts had little guidance in assessing weight to be given the social values of family and marriage. Consideration of the marital privileges has long consisted of holding up a wetted judicial finger to determine the direction of the popular breeze.<sup>27</sup> The *Trammel* opinion was implicitly driven by the Court's view of two broad social phenomena: The impact of the Sexual Revolution on the family and marriage, and the War on Crime. The former has changed significantly in the years since 1980. The latter was, perhaps, misplaced.

The *Trammel* opinion expressly acknowledged the absence of federal policy on family and marriage as an obstacle to evaluating the Spouses' Testimonial Privilege.<sup>28</sup> The fifteen years since the *Trammel* decision have seen the emergence of an express federal policy on families and marriages. The traditional federal abstention from involvement in marriage and family issues has evaporated. A clear federal policy and willingness to regulate both are emerging.<sup>29</sup> On

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27. "[T]he laws of marriage and domestic relations are concerns traditionally reserved to the states." *Trammel v. United States*, 445 U.S. at 50. See also the Court's survey of the States' treatment of the Spouses' Testimonial Privilege. *Id.* at 48-50.

28. *Trammel v. United States*, 445 U.S. at 49-50 (citing *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

29. See, e.g., Deborah Maranville, *Welfare and Federalism*, 36 LOY. L. REV. 1 (1990) (review of abstract and pragmatic political components of the debate about federal versus state and local control of welfare); Steven R. Smith, *Disabled Newborns and the Federal Child Abuse Amendments: Tenuous Protection*, 37 HASTINGS L.J. 765 (1986) (federal child abuse statutes are probably ineffective in achieving the intended purpose of influencing decisions to withhold treatment of newborns); Mary Ann Born, *Baby Doe's New Guardians: Federal Policy Brings Nontreatment Decisions Out of Hiding*, 75 KY. L.J. 659 (1986-87) (attempt to reconcile conflicting messages from Supreme Court and Congress embodied in court adherence to tradition on federal non-intervention in parenting decisions as embodied in *Bowen v. American Hospital Association*, 476 U.S. 610 (1986) and the Child Abuse Amendments of 1984, 42 U.S.C. §§ 5101-5103 (1982)); Faye R. Goldberg, *Child Support Enforcement: Balancing Increased Federal Involvement With Procedural Due Process*, 19 SUFFOLK U. L. REV. 687 (1985) (noting the trend toward increased federal participation in support enforcement and calling for more); Douglas B. Neagli & Matthew B. Troutman, *Constitutional Implications of the Child Support Enforcement Amendments of 1984*, 24 J. FAM. L. 301 (1985) (analyzing the policy and regulatory impact of the act). The breadth and detail of federal regulatory intervention in family law matters can be glimpsed in the following statutes: 18 U.S.C.A. § 228 (West Supp. 1994) (criminalizing "Failure to pay legal child support obligations"); 42 U.S.C.A. §§ 280b-1a (West Supp. 1994) ("Interpersonal violence within families and among acquaintances"); 42 U.S.C.A. §§ 280c-6 (West Supp. 1994) ("Projects to improve maternal, infant, and child health"); 42 U.S.C.A. § 602 (West 1991 & Supp. 1994) ("State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances"); 42 U.S.C.A. § 656 (West 1991 & Supp. 1994) ("Support obligation as obligation to State; amount; discharge in bankruptcy"); 42 U.S.C.A. § 658 (West 1991) ("Incentive payments to States [based upon collections of past-due support]"); 42 U.S.C.A. § 659 (West 1991 & Supp. 1994) ("Enforcement of individual's legal obligations to provide child support or make alimony payments"); 42 U.S.C.A. § 660 (West 1991 & Supp. 1994) ("Civil action to enforce child support obligations; jurisdiction of [United States] district courts"); 42 U.S.C.A. § 664 (West 1991 &

May 1, 1991 the National Commission on Children published its final report: *Beyond Rhetoric: A New American Agenda for Children and Families*. The National Commission on Children was jointly established by President Reagan and Congress in December of 1987. Its mandate

was to assess the status of children and families in the United States and propose new directions for policy and program development. [The Commission's] mission was to design an action agenda for the 1990s and to build the necessary public commitment and sense of common purpose to see it implemented.<sup>30</sup>

The Commission's final report represents a major shift in the winds of federal policy on family and marriage last tested by the Supreme Court in *Trammel*.

The purpose of this Article is to re-examine the *Trammel* decision. We shall examine the implied social assumptions and predictions upon which the Court based its decision. We will also examine the impact of this decision on efforts to extend evidentiary protections to familial relationships beyond those of wives and husbands.

## II. THE UNITED STATES AND *MRS. TRAMMEL v. MR. TRAMMEL*

"Now I can no longer be required to testify against you in any jurisdiction anywhere."

I stared thoughtfully at my bride . . . . "I am grateful that you do not want to testify against me. But I am not sure that

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Supp. 1994) ("Collection of past-due support from Federal tax refunds"); 42 U.S.C.A. § 654 (West 1991 & Supp. 1994) ("State plan for child and spousal support"); 42 U.S.C.A. § 666 (West 1991 & Supp. 1994) ("Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement"); 42 U.S.C.A. § 667 (West 1991) ("State guideline for child support awards"); 42 U.S.C.A. § 669 (West 1991) ("Collection and reporting of child support enforcement data"); 42 U.S.C.A. § 5101 (West 1983 & Supp. 1994) ("National Center on Child Abuse and Neglect"); 42 U.S.C.A. § 5102 (West Supp. 1994) ("Advisory Board on Child Abuse and Neglect"); 42 U.S.C.A. § 5103 (West Supp. 1994) ("Inter-Agency Task Force on Child Abuse and Neglect"); 42 U.S.C.A. § 5104 (West Supp. 1994) ("National clearinghouse for information relating to child abuse"); 42 U.S.C.A. § 5105 (West Supp. 1994) ("Research and assistance activities of the National Center on Child Abuse and Neglect"); 42 U.S.C.A. § 5106a (West Supp. 1994) ("Grants to States for child abuse and neglect prevention and treatment programs"); 42 U.S.C.A. § 5106c (West Supp. 1994) ("Grants to States for programs relating to the investigation and prosecution of child abuse and neglect cases"); 42 U.S.C.A. § 5116 *et seq.* (West Supp. 1994) ("Community-based family resource programs"); 42 U.S.C.A. § 10407 (West Supp. 1994) ("Information and technical assistance centers [for family violence]"); 42 U.S.C.A. § 10410 (West Supp. 1994) ("Grants for state domestic violence coalitions"); 42 U.S.C.A. § 10413 (West Supp. 1994) ("Family member abuse information and documentation project"); 42 U.S.C.A. § 10415 (West Supp. 1994) ("Model State leadership grants for domestic violence intervention").

30. NATIONAL COMMISSION ON CHILDREN, *BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES* viii (1991).

the legal principle you cited can be applied in this jurisdiction.”

“But that’s a general rule of justice, Richard. A wife can’t be forced to testify against her husband. Everyone knows that.”<sup>31</sup>

Robert Heinlein’s protagonists hold this conversation in the year 2188. They have just been married in one of several extraterrestrial habitats then occupied by humans.

#### *A. Prelude: Common Law Privileges and the Federal Rules of Evidence*

The two marital privileges had a long run, remaining undisturbed for three centuries. In 1933, the Supreme Court in *Funk v. United States*,<sup>32</sup> abrogated the rule of spousal incompetency. Prior to *Funk*, spouses of parties were deemed incompetent to testify. This rule was derived from the rule, although the latter had already been abandoned, that all parties were incompetent to testify.<sup>33</sup> The ruling in *Funk* left the Spouses’ Testimonial and Marital Communications Privilege undisturbed.<sup>34</sup> In 1958, the Court expressly reaffirmed the Spouses’ Testimonial Privilege in *Hawkins v. United States*.<sup>35</sup>

Mr. Hawkins, a resident of Arkansas, was accompanied on a trip to Oklahoma by a woman other than his wife. While in Oklahoma he was arrested and charged with interstate prostitution in violation of the Mann Act.<sup>36</sup> Mr. Hawkins claimed he was engaged in an honest business trip. The woman’s presence was “only an accommodation . . . .” The woman testified that Mr. Hawkins “agreed to take her to Tulsa where she could earn money by working as a prostitute . . . .”<sup>37</sup> Mr. Hawkins’ wife appeared at trial, ready, willing, and, since *Funk*, able to testify for the prosecution. The trial court permitted Mrs. Hawkins to testify, notwithstanding her husband’s assertion of the Spouses’ Testimonial Privilege. Mr. Hawkins was convicted.

In *Hawkins v. United States*,<sup>38</sup> the Supreme Court distinguished between the rule of spousal incompetency abandoned in *Funk* and

31. ROBERT A. HEINLEIN, *THE CAT WHO WALKS THROUGH WALLS* 27-29 (G. P. Putnam’s Sons, 1985).

32. 290 U.S. 371 (1933).

33. The incompetency of the party spouse was imputed to the non-party spouse, based upon the legal presumption that spouses had an identity of interests, at least as against third persons.

34. For a discussion of the Spouses’ Testimonial Privilege and the Role of Spousal Incompetency, see *infra* notes 68-100 and accompanying text.

35. 358 U.S. 74 (1958).

36. 18 U.S.C. § 2421 (1988) (original version at ch. 645, 62 Stat. 812 (1948)). See also *Hawkins v. United States*, 358 U.S. at 74-79.

37. *Hawkins v. United States*, 358 U.S. at 80.

38. 358 U.S. 74 (1958).

the Spouses' Testimonial Privilege. The former was no longer justified since the parties were themselves deemed competent.<sup>39</sup> The Spouses' Testimonial Privilege, however, was based upon a different justification, a justification still viable in the mid-Twentieth Century.

While the rule forbidding testimony of one spouse *for* the other was supported by reasons which time and changing legal practices had undermined, we are not prepared to say the same about the rule barring testimony of one spouse *against* the other. The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace . . . .<sup>40</sup>

The benefits of familial peace extended beyond the family. The public policy was also based upon the belief that intact families provided benefits to the public as well.

The Court concluded: "Such a belief has never been unreasonable and it is not now."<sup>41</sup> The government argued that the wife's willingness to testify indicated there was no marriage worth saving. The Court disagreed. The Court remarked that anger passes and some marriages survive deeply troubled times. "[T]here is still a widespread belief, grounded on present conditions, that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences."<sup>42</sup>

Barely seven years later the Court launched the marital privileges onto perilous waters. In 1965, Chief Justice Warren appointed an Advisory Committee to draft rules of evidence. The Committee's conceptual approach to reform was antithetical to all evidentiary privileges. The Advisory Committee wished to expand admissibility to encompass all relevant information. Whenever possible, privileges would be eliminated. If this was not possible, they would be pared to the bone in scope and applicability.<sup>43</sup>

In October of 1970, the Judicial Conference approved a Revised Draft of the Proposed Rules. The Revised Draft included a proposed revision and codification of all common law evidentiary privileges based on this approach. The Spouses' Testimonial Privilege was preserved, the Marital Communications Privilege was eliminated.<sup>44</sup> The Supreme Court published the Revised Draft, seeking final comment before promulgation. "[O]rganized opposition sur-

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39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 79. The Marital Communications Privilege had been recognized by the Supreme Court in *Wolfe v. United States*, 291 U.S. 7 (1934), and again in *Blau v. United States*, 340 U.S. 332 (1951).

43. 2 JACK B. WEINSTEIN & MARGARET A. BURGER, *WEINSTEIN'S EVIDENCE*, ¶ 501[01] (1991).

44. Proposed FED. R. EVID. 505, 51 F.R.D. 315, 369, provided:

faced, notably from the United States Justice Department. Conservative members of Congress were also upset . . . ."<sup>45</sup> Opposition to the proposed rules focused on the Court's treatment of privilege.<sup>46</sup>

The Supreme Court approved the revised rules in November, 1972 and sent them to Congress as required by the Rules Enabling Act.

The committee hearings, floor debates, and resulting disparity between the House and Senate bills presented the conference committee with a formidable challenge. The dispute over the continued existence and scope of the marital privileges was particularly intense. Enactment of the rules was delayed for two years.<sup>47</sup> For a time it appeared the dispute over the Marital Privileges might cause Congress to reject the entire set of rules.<sup>48</sup> Congress, unable to resolve the dispute within its own ranks, finally gave up. When enacted by Congress in 1975, the evidentiary privileges were excluded from the Federal Rules of Evidence. The privileges remained in the domain of the common law.<sup>49</sup> Privileges would remain the last bastion of the federal common law of evidence.

RULE 505. HUSBAND-WIFE PRIVILEGE.

(a) General rule of privilege.

An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.

(b) Who may claim privilege.

The privilege may be claimed by the person or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of evidence to the contrary.

Subsection (c) of the proposed rule provided for certain exceptions in cases involving crimes against the spouse or children of either. The proposed rule was based on Uniform Rule of Evidence 504 (1953). This formulation differed from the traditional rule only in that it vested the privilege in only the party spouse rather than in both. The Uniform Rule was amended in 1986 to conform to the decision in *Trammel*.

45. RONALD L. CARLSON ET AL., *EVIDENCE IN THE NINETIES* 25 (3rd Ed. 1991).

46. WEINSTEIN, *supra* note 43, ¶ 505[01].

47. *Id.*

48. *Id.*

49. FED. R. EVID. 501 reads:

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

The Enabling Act was also amended. The new version provided Congress more time to react to proposed changes in the Rules of Evidence. More specifically, the new act provided: "Any . . . rule creating, abolishing, or modifying an evidentiary

The Spouses' Testimonial Privilege survived intact. *Hawkins* was still the law of the land.

B. *Whose Reason? What Experience?*  
*A Lever in Search of a Fulcrum*

Five years after the Federal Rules of Evidence became law the Supreme Court exercised its *reason and experience* upon the Spouses' Testimonial Privilege in *Trammel*.

Mr. Trammel and two others were charged with importation and conspiracy to import heroin. Their smuggling activities involved six other unindicted co-conspirators, including Mr. Trammel's wife, Elizabeth. Mr. and Mrs. Trammel successfully smuggled heroin into the United States on a trip from the Philippines to California in August 1975. Later, Mrs. Trammel went back to the Far East, without her husband, for more heroin. The heroin was discovered this time, during a customs search on her return to the United States. Elizabeth Trammel agreed to testify against her husband.<sup>50</sup>

At her husband's trial, "Mrs. Trammel was called as a Government witness under a grant of use immunity . . . . She explained that her cooperation with the Government was based on assurances that she would be given lenient treatment."<sup>51</sup> Elizabeth Trammel had not been prosecuted for her role in the conspiracy.<sup>52</sup> Mr. Trammel, relying on *Hawkins*, objected to his wife's testifying against him. His objection was overruled by the trial court. Mrs. Trammel testified for the government. Mr. Trammel was convicted and appealed. The Court of Appeals for the Tenth Circuit affirmed. The Circuit found "a compelling need to alter or amend the common law rule enunciated in *Hawkins* . . . ." <sup>53</sup> Mrs. Trammel's complicity as a co-conspirator required an exception to the Spouses' Testimonial Privilege.

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privilege shall have no force or effect unless approved by [an] Act of Congress." 28 U.S.C. 2074(b) (1988). These changes only prevented judicial modification or abrogation of privileges by exercise of its rule-making power. Rule 501 did not prevent further interpretation by the Court in deciding specific cases. *Trammel v. United States*, 445 U.S. 40, 47 (1980).

The British recently had the opposite experience, with equally unsatisfactory results. Parliament undertook to rewrite and enact its own reform of the Spouses' Testimonial Privilege. Peter Creighton, *Spouse Competence and Compellability* 1990 CRIM. L. REV. 34, 35. For additional discussion on the practical problems of compelling the reluctant spouse to testify in England and Wales, with comparisons to similar problems in Australia, Canada, and the United States, see Susan Edwards, *Compelling a Reluctant Spouse*, 139 NEW L.J. 691 (1989).

50. *Trammel v. United States*, 445 U.S. at 42.

51. *Id.* at 43 n.2.

52. *Id.* at 42, 43.

53. *Trammel v. United States*, 583 F.2d 1166, 1168 (10th Cir. 1978); *aff'd* 445 U.S. 40 (1980).



In our view the allegiance reaffirmed in *Hawkins* . . . to the marital testimonial privilege grounded on the policy of preserving or fostering family peace must give ground to a greater, more compelling public need before us here. This case, unlike *Hawkins* and other cases, involves the wife as a participant in the criminal transaction, subject to prosecution therefor.<sup>54</sup>

The Tenth Circuit in *Trammel* quoted with approval from the Seventh Circuit's opinion in *United States v. Van Drunen*: The "goal of preserving families [did] not justify assuring a criminal that he can enlist the aide of his spouse in a criminal enterprise without fear that . . . he is creating another potential witness."<sup>55</sup>

The United States Supreme Court chose another path. It held that Mr. Trammel was correct. Under *Hawkins* and the common law, Mr. Trammel could prevent his wife's testimony by assertion of the Spouses' Testimonial Privilege. But the Supreme Court Justices did what the judges of the Tenth Circuit could not: they overruled *Hawkins*.<sup>56</sup> Beginning with the testimony of Elizabeth Trammel, the Spouses' Testimonial Privilege was held only by the *witness* spouse.

The following is a summary of the Supreme Court's analysis and decision. While the Court felt it should be cautious in changing the Spouses' Testimonial Privilege because it has a long history,<sup>57</sup> it nevertheless noted that the Spouses' Testimonial Privilege is a vestigial remnant of an abandoned legal theory and ancient sexist legalisms that are no longer acceptable to our society.<sup>58</sup> The Court approached the privilege cautiously because "marriage, home and family relationships [are] already subject to much erosion in our day."<sup>59</sup> Noting that modern apologists for the privilege argue that it fosters the "harmony and sanctity of the marriage relationship,"<sup>60</sup> the Court, however, viewed this justification to be wrong. If one is willing to testify against their spouse, said the Court, there is "little"

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54. *Id.* at 1168.

55. *Id.* at 1169-70 (quoting *United States v. Van Drunen*, 501 F.2d 1393, 1396-97 (7th Cir. 1974)). The Tenth Circuit limited its decision to the facts before it, holding only that "a defendant husband cannot prevail upon his claim of the marital privilege when his wife gives incriminating testimony under grant of immunity." *Id.* at 1169. The court indicated, however, that it was open to further extensions of the exception such as those previously recognized by the Eighth Circuit in *United States v. Smith*, 520 F.2d 1245 (8th Cir. 1975) (admitting statements of a co-conspirator spouse made during the course and in furtherance of the conspiracy) and the Seventh Circuit in *United States v. Van Drunen*, 501 F.2d 1393 (7th Cir. 1974) (rejecting the Spouses' Testimonial Privilege in cases where both spouses are involved as accomplices or co-conspirators).

56. *Trammel v. United States*, 445 U.S. at 43, 53.

57. *Id.* at 43-48.

58. *Id.* at 43-44, 52.

59. *Id.* at 48.

60. *Id.* at 44.

marital harmony remaining to be preserved.<sup>61</sup> Thus, in the Court's view the common law Spouses' Testimonial Privilege disrupts marriages by allowing one spouse to stay out of prison by testifying against the other.<sup>62</sup> The Court noted that modern critics see the privilege as "an indefensible obstruction to truth."<sup>63</sup> The Court pointed out that family law matters are traditionally concerns of the states, not the federal government and that a growing number of states have limited or abolished the Spouses' Testimonial Privilege.<sup>64</sup> It further noted that confidential communications are privileged.<sup>65</sup> The Spouses' Testimonial Privilege, in the Court's view, permits everyone to convert their home into a den of thieves; it gives every married person "one safe and unquestionable and ever ready accomplice for every imaginable crime."<sup>66</sup> Changing the privilege will not encourage the government to "pit one spouse against the other," because the government can do this under the existing law.<sup>67</sup> The Court found that vesting the Spouses' Testimonial Privilege in only the witness-spouse furthers "marital harmony without unduly burdening legitimate law enforcement needs."<sup>68</sup>

The Court's arguments fall into two categories. First, there are the historical attacks. The Court concluded the privilege was intended to protect Medieval sexual roles that have been abandoned. We shall consider these aspects of the *Trammel* decision in the following section. The second category of issues raised by the Court involves an assessment of the importance of marriage and the family *versus* the need for evidence in contemporary society. These arguments are discussed in Section IV below.

### III. MEDIEVAL JURISPRUDENCE AND THE TWENTIETH CENTURY: ORIGINS OF THE SPOUSES' TESTIMONIAL PRIVILEGE

In this Section, we shall address three questions. First, is the Spouses' Testimonial Privilege an anachronistic relic of the long abandoned rule of Spousal Incompetency? Second, is it intrinsically gender biased? Third, why have two marital privileges?

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61. *Id.* at 52-53.

62. *Id.*

63. *Id.* at 45 (citing 8 JOHN HENRY WIGMORE, EVIDENCE § 2228, at 221 (1961)).

64. *Id.* at 48-50.

65. *Id.* at 51.

66. *Id.* at 52 (quoting 5 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, at 338 (1827)).

67. *Id.* at 52 n.12.

68. *Id.* at 53.

A. *The Spouses' Testimonial Privilege and the Rule of Spousal Incompetency*

Early English courts held that a party was *always* incompetent to testify as a witness. The rule was based upon the judgment that the parties' interest in the outcome made it probable that any testimony they might give would be unreliable. From this premise, a corollary rule of Spousal Incompetency developed. The incompetency of all parties was extended to their spouses, as married couples were presumed to share an identity of interests.<sup>69</sup>

The common law rule held that the spouses of all parties were incompetent to testify. Because they were incompetent, they could not be called by either party. Theoretically at least, the court would not permit a spouse of either party to testify, even if neither objected. As explained above, the Spouses' Testimonial Privilege could be asserted by either spouse to prevent one from being compelled to testify against the other.

The Court in *Trammel* saw the Spouses' Testimonial Privilege as a surviving vestige of the rule of Spousal Incompetency, which was abandoned in *Funk*.<sup>70</sup> This characterization was a mistake, one not made by the Court in *Hawkins*.<sup>71</sup> It is unclear whether this mistake was the cause of, or was caused by, the decision to overrule *Hawkins*.

In *Trammel*, Chief Justice Burger wrote:

The privilege claimed by [Mr. Trammel] has ancient roots. Writing in 1628, Lord Coke observed that "it hath beene resolved by the Justices that a wife cannot be produced either against or for her husband." . . . This spousal disqualification sprang from two canons of medieval jurisprudence: first, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; second, the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one. From those two now long-abandoned doctrines, it followed that what was inadmissible from the lips of the defendant-husband was also inadmissible from his wife.

Despite its medieval origins, this rule of spousal disqualification remained intact in most common-law jurisdictions well into the 19th century . . . [I]t was deemed so well established [by the Supreme Court] as to "hardly requir[e] mention." Indeed it was not until 1933, in *Funk v. United States* . . . that this

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69. In this Article, the disqualification of a party's spouse shall be referred to as the rule of Spousal Incompetency. There was no inequity in preventing testimony in civil claims of one spouse against the other. Since both were parties, neither could testify. In this respect, spouses were treated the same as all other litigants.

70. *Trammel v. United States*, 445 U.S. at 44 (citing *Funk v. United States*, 290 U.S. 371 (1933)).

71. *Hawkins v. United States*, 358 U.S. 74 (1958).

Court abolished the testimonial disqualification in the federal courts, so as to permit the spouse of a defendant to testify in the defendant's behalf. *Funk*, however, left undisturbed the rule that either spouse could prevent the other from giving adverse testimony. . . . The rule thus evolved into one of privilege rather than one of absolute disqualification.<sup>72</sup>

Chief Justice Burger returned to this theme later in the opinion.

The ancient foundations for so sweeping a privilege have long since disappeared. Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being.<sup>73</sup> Chip by chip, over the years those archaic notions have been cast aside so that “[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”<sup>74</sup>

In short, the *Trammel* Court found the Spouses' Testimonial Privilege the vestigial remnant of the rule of Spousal Incompetency, which was already an anachronism when finally abandoned a half-century earlier in *Funk*. However, the Spouses' Testimonial Privilege did not derive from the rules of party and spousal disqualification. As noted above, the Court did not make this mistake in *Hawkins v. United States*.<sup>75</sup> Justice Black expressly distinguished between the policies supporting the rule of Spousal Incompetency and the Spouses' Marital Privilege.<sup>76</sup> Furthermore, Justice Black wrote the *Hawkins* opinion in 1958. If the Court's rhetoric in *Trammel* is to be taken at face value, one must assume that only after that date did a majority of the United States Supreme Court cease to regard women as mere chattels, admit women had a legal identity in-

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72. *Trammel v. United States*, 445 U.S. at 43-44 (citations omitted).

73. The accuracy of this statement is questionable. It is literally true only if understood as an attempt to define as “archaic” any societies adhering to a cultural view that does not include a presumption of sexual equality. Clearly there are contemporary societies that are modern by most criteria other than equality in legal status and public roles of men and women.

74. *Trammel v. United States*, 445 U.S. at 52 (quoting *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975)). There is some suggestion that the medieval courts accorded wives somewhat more recognition than is suggested by the Court in *Trammel*:

In Henry III's reign [1547-89] . . . [t]he attorneys . . . are by no means always professional men of business. Probably every free and lawful man may act as the attorney of another; indeed, shocking as this may seem to us, we may, not very infrequently, find a wife appearing in court as her husband's attorney.

FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 95 (AMS Press 1978) (1915).

75. 358 U.S. 74 (1958).

76. *Id.*

dependent of their husbands, and otherwise begin to recognize women as "whole human beings."<sup>77</sup>

The Court's confusion of the historical basis of the Spouses' Testimonial Privilege is of more than scholarly interest. Rules of competency and privilege are supported by very different policy goals. As we shall see, whatever its value today, the Spouses' Testimonial Privilege never looked to the rule of Spousal Incompetency for justification.

### 1. *The Rule of Spousal Incompetency*

The distinctions between competency and privilege appear fairly straightforward. Nevertheless, Chief Justice Burger was not the first to confuse the two when dealing with the party/spousal rule of incompetency and the marital privileges.<sup>78</sup>

"Competency" is a threshold measure of a witness' ability to provide reliable testimony. The degree of reliability required to accept a witness as competent has changed over the centuries. The underlying concept, however, has remained constant. It has always been the duty of the trial judge to prevent incompetent witnesses from testifying.<sup>79</sup> On the other hand, common law courts have always permitted the testimony of all competent witnesses having information relevant to a material issue of fact. Indeed, the common law courts have a long tradition of compelling such testimony. Witnesses who are capable of providing reliable testimony will be heard. Those who are not, will not. In this sense, competency is the first rule of evidence. The exclusion of incompetent witnesses is consistent with the underlying goal of the trial process: the determination of truth. This goal is furthered by consideration of reliable evidence. Consideration of unreliable evidence leads to unreliable decisions.

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77. Justice Stewart's concurring opinion in *Trammel* comes close to making the same point. Justice Stewart dissented from the majority in *Hawkins*: "I thought [the Government's] arguments were valid then, and I think so now." *Trammel v. United States*, 445 U.S. at 54 (1980) (Stewart, J., concurring) (citations omitted). Justice Stewart expressly agrees with the Chief Justice's assertion that the foundations for the privilege have been swept away; he thought they were long gone in 1958. *Id.*

78. *E.g.*, *Blau v. United States*, 340 U.S. 332, 334-35 (1951) (Minton, J., dissenting) (failing to distinguish privilege from competency); *The King v. Cliviger*, 100 Eng. Rep. 143, 146 (1788) (acknowledging the problem). Even Justice Black in *Hawkins* initially referred to Spousal Incompetency and the Spouses' Testimonial Privilege as two phases of the same rule, the only distinction being admission of favorable testimony. *Hawkins v. United States*, 358 U.S. at 76 (1958). As noted above, however, he drew a clear distinction between the basis for each "phase."

79. For a survey of the tests of competency currently incorporated in the evidence rules adopted by a variety of states, see 1 GEORGE P. JOSEPH & STEPHEN A. SALTZBURG ET AL., *EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES* ch. 35 (1990).

The rule of Spousal Incompetency was an adjunct to the underlying disqualification of all parties. At least as early as the second half of the seventeenth century, the English courts held that all parties were incompetent to testify as witnesses.<sup>80</sup> The rule was based upon the parties' interest in the outcome. It was assumed their interest would make their testimony unreliable. This rule became part of the American common law. In 1810 Samuel Bayard noted that "[o]ur books are filled with cases of characters who are disqualified from being witnesses, on account of the *interest* or very *strong bias* they are supposed necessarily to have, which in the contemplation of law, precludes the probability of their adhering strictly and impartially to the truth."<sup>81</sup>

The ancient common law concept of competency varies from the modern concept embodied in the rules of evidence only in the degree of unreliability that will be tolerated. Initially, it was assumed that justice was best served by eliminating all testimony that might be distorted by interest. Our ancestors apparently had more faith in the jury's ability to infer the truth from limited evidence than in its ability to detect falsehood and error.<sup>82</sup>

The same presumption of unreliability was extended to anyone with an interest in the outcome. The incompetency of a party was shared by his or her spouse, because the spouse was presumed to

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80. See Scott Rowley, *The Competency of Witnesses*, 24 IOWA L. REV. 482 (1939) for a discussion of competency under the common law. Rowley suggests that the concept is universal to all legal systems. He finds the common law approach to competency as noteworthy only for the relatively few individuals excluded as witnesses. *Id.* at 490.

81. SAMUEL BAYARD, A DIGEST OF AMERICAN CASES ON THE LAW OF EVIDENCE 111-12 (1810). See also *Bensen v. United States*, 146 U.S. 325, 335 (1892).

82. This approach is sensible when viewed in the context of a system using a panel of knowledgeable but disinterested individuals as the fact-finding jury. The original evidentiary witnesses were people whose connections to the case or parties precluded their sitting as impartial jurors, but which were not so close as to preclude them from giving evidence. 1 E. COKE, A COMMENTARIE UPON LITTLETON 6b (1628) (1832 ed.) ("[O]ften times a man may be challenged to be of a Jury, than cannot be challenged to be of a Witsnesse; and therefore though the witsnesse be of the nearest alliance, or kindred . . . to either party . . . shall not exclude the witsnesse to be sworne.").

Modern research into the ability of judges and lay persons to detect error through body language suggests this approach may have more merit than is generally supposed. Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AMERICAN PSYCHOLOGIST 913 (1991).

Today, the jury trial is based on opposite presumptions. We assiduously keep anyone with knowledge of the case or parties off the jury panel. We also assume that justice is better served by letting these ignorant finders of fact hear all available information, even that from sources which may be unreliable. We rely upon them to distinguish truth from falsehood, and to winnow out the effects of interest, bias, and prejudice.

share the party's interest in the outcome.<sup>83</sup> The marital relationship was important because of its effect upon the spouse's reliability. As a matter of law, husband and wife were presumed to constitute a legal unity. It was this legal unity of interest that caused the courts to attribute the incompetency of the party to her or his spouse.

The rule of Spousal Incompetency was not entirely a result of the legal fiction of a marital unity of interests. Courts also acknowledged that the personal bond between spouses created personal influences beyond any identity of legal interest. The courts realized that the emotional aspects of marital relationships could affect the spouse's testimonial reliability in unpredictable ways. If the emotional bond had been broken or become antagonistic, the spouse might be motivated to injure the spouse, whatever their shared interests. It did not matter if the testimony would favor or hurt the cause of the party spouse.<sup>84</sup> Whether the marital relationship resulted in a desire to help or an emotional motive to injure, the result was the same. The party's spouse could not be counted on to give reliable testimony. Therefore, the witness was incompetent and would not be heard.

The historical sexist presumptions imbedded in the view that marriage created a legal unity are undeniable. The right and power to bind and loose the marital entity was vested in the husband. The limitations upon that power were few.<sup>85</sup> This meant that the husband was generally the party and the wife the witness. Nevertheless, the theory of spousal incompetency was gender neutral in concept: both spouses were incompetent. It did not matter which was the party and which the witness.<sup>86</sup>

During the nineteenth century, views about competency began to change on this side of the Atlantic. In 1864, Congress enacted a statute providing that parties in civil cases were competent as witnesses.<sup>87</sup> A similar statute providing that defendants in federal criminal cases were competent to testify in their own defense was

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83. COKE, *supra* note 82, at 6b (one cannot be called to testify for or against his or her spouse).

84. *E.g.*, Stein v. Bowman, 38 U.S. 209, 221, 13 Pet. 207, 220 (1839).

85. 1 WILLIAM BLACKSTONE, COMMENTARIES \*442 (the wife's legal existence is "suspended or at least is incorporated and consolidated into that of the husband" during the term of the marriage). See also HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 7.1 (1968).

86. BLACKSTONE, *supra* note 85, at \*431. For early United States cases suggesting a sexist bias by courts in determining competency on other grounds, see Michael W. Mullane, *The Truthsayer and The Court: Expert Testimony on Credibility*, 43 ME. L. REV. 53, 95 n.165 (1991).

87. Professor James F. Colby reports that: "The first statute of this kind in America, admitting testimony of all persons on equal terms, leaving it for the triers to give it . . . such weight as it may deserve, was enacted in Connecticut in 1848. This statute appears to have influenced [the British] Parliament in passing a similar measure . . . in 1851." MAITLAND & MONTAGUE, *supra* note 74, at 169 n.1.

passed in 1878.<sup>88</sup> States also began to abandon rules of party incompetency during the second half of the last century. The abandonment of party and spousal incompetency had nothing to do with social concerns over sexual roles or the stability of marriages. The change was prompted by a greater trust in juries' ability to determine credibility issues.

The federal rule of Spousal Incompetency, however, survived well into the twentieth century. As previously noted, the Supreme Court finally abolished the rule in *Funk v. United States*, decided in 1933.

[S]ince defendants were uniformly allowed to testify in their own behalf, there was no longer a good reason to prevent them from using their spouses as witnesses. With the original reason for barring favorable testimony of spouses gone the Court concluded that this aspect of the rule should go too.<sup>89</sup>

The essential point is that the rules of party and spousal disqualification were based upon considerations of evidentiary reliability. Neither sought to preserve the marital relationship.

## 2. *The Spouses' Testimonial Privilege*

As already noted, the common law developed two distinct rules of evidentiary privilege based on the marital relationship: the Spouses' Testimonial and Marital Communications Privileges.<sup>90</sup> The primary distinction between matters of competency and privilege rests in the concept of compellability. That is the distinction between a witness who *may* be heard and the power to *compel* a witness to testify. Incompetent witnesses will not be allowed to testify—even if neither party objects.<sup>91</sup> On the other hand, all competent witnesses *may* testify. But, not all competent witnesses can be compelled to testify.

Competent witnesses holding an evidentiary privilege may not be compelled to testify about matters protected by the privilege. The Spouses' Testimonial Privilege is no different in this respect than any other evidentiary privilege.

The *Trammel* decision suggests that the Spouses' Testimonial Privilege evolved only as a replacement for the Rule of Spousal In-

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88. *Benson v. United States*, 146 U.S. 325, 336 (1892).

89. *Hawkins v. United States*, 358 U.S. at 76 (explaining its earlier decision in *Funk v. United States*).

90. The Advisory Committee's Note to proposed Rule 505 suggested there were two privileges against testimony against a party by his or her spouse: one for the party spouse, and another for the witness spouse. This approach was also taken by the Court in *Wyatt v. United States*, 362 U.S. 525, 526-28 (1960). Most commentators and courts, however, see this as a single privilege jointly held by both spouses.

91. Admittedly, this is not always the result. Absent objection by someone, the court may be unaware of the witness's incompetency. However, once aware that a witness is incompetent, the court must prevent her or him from testifying.



competency when it was abandoned during the last century.<sup>92</sup> In fact, however, the Spouses' Testimonial Privilege, had been recognized by the common law for over three centuries. Both privileges existed side by side with the rules of Party and Spousal Incompetency for several centuries. Indeed, Dean Wigmore states that the Spouses' Testimonial Privilege predates the rule of Spousal Incompetency. The first known reference to the rule of Spousal Incompetency is found in Lord Coke's *Commentarie upon Littleton* written in 1628.<sup>93</sup> Dean Wigmore cites references to the Spouses' Testimonial Privilege that predate this reference by a half century.<sup>94</sup> By 1623, five years before Lord Coke's remark, Parliament found it necessary to create a statutory exception to the privilege in bankruptcy cases.<sup>95</sup> Indeed, the Spouses' Testimonial Privilege not only predates the rule of Spousal Incompetency, it appears to predate even the privilege against self-incrimination.<sup>96</sup>

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92. *Trammel v. United States*, 445 U.S. at 44.

93. The Supreme Court in *Trammel* mistakenly cites this reference as a source of the Spouses' Testimonial Privilege. *Trammel v. United States*, 445 U.S. at 43-44. Lord Coke, however, clearly was speaking about the rule of Spousal Incompetency. Lord Coke first lists various grounds of incompetency including sanity, youth, "or a partie interested." He then adds: "[I]t hath beene resolved by the Justices that a wife cannot be produced either against or for her husband, *quia sunt duae animae in carne una* . . ." Spousal testimony for as well as *against* a party is barred. 1 E. COKE, A COMMENTARIE UPON LITTLETON 6b (1628). The reference, therefore, must be to a rule of incompetency barring all testimony. The Spouses' Testimonial Privilege only bars testimony *against* the party spouse. Unfortunately, Lord Coke saw fit to add a reference to the preexisting Spouses' Testimonial Privilege when he added: "[A]nd it might be the cause of implacable discord and dissention betweene the husband and wife . . ." *Id.* Coke's coupling in the same sentence both privilege and disqualification may offer a partial explanation of the tendency to equate the Spouses' Testimonial Privilege with the rule of Spousal Incompetency.

94. 8 WIGMORE, EVIDENCE § 2227 (McNaughton rev. 1961), citing 1 Bent v. Allot, Cary 135, 21 Eng. Rep. 50 (Ch. 1580).

95. *Id.*

96. See *id.* §§ 2227, 2333. The Marital Communications Privilege is even older. *Id.* It is not surprising to discover that the earliest evidentiary privilege acknowledged by the common law was that shielding the attorney/client relationship. See Note, *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1456 (1985) (citing *Berd v. Lovelace*, 21 Eng. Rep. 33 (1577) and *Dennis v. Codrington*, 21 Eng. Rep. 53 (1580)). All three of the evidentiary rules arising out of the marital relationship predate the accused's privilege against self-incrimination. The privilege against self-incrimination was not generally accepted before 1641 and the decision in *Lilburn's case*. 3 How. St. Tr. 1315 (1637-45). It was only after *Lilburn* that:

[W]ith a rush, the Courts of Star Chamber and of High Commission are abolished, and the "ex officio" oath to answer criminal charges is swept away with them. With all this stir and emotion, a decided effect is produced and is immediately communicated . . . to the common law courts . . . It begins to be claimed, flatly, that *no man is bound to incriminate himself on any charge* (no matter how properly instituted) or *in any court* not merely in the ecclesiastical or Star Chamber tribunals). Then this claim

The Spouses' Testimonial Privilege cannot be a vestigial remnant of the rule of Spousal Incompetency. For this to be true, we would have to accept the logically absurd proposition that the effect preceded the cause.

Nevertheless, the frequency with which parties and witnesses had recourse to the Spouses' Testimonial Privilege must have decreased after acceptance of the rule of Spousal Incompetency. Testimony damaging to the spouse of the witness is most likely to arise when the spouse is a party. After acceptance of the rule of Spousal Incompetency, there was no need to assert the privilege in such cases. A competency objection would prevent the witness from taking the stand altogether.

The privilege was not entirely moot, however. The rule of privilege was available and necessary for non-party witnesses. Non-party witnesses might be asked questions that could "criminate" their non-party wife or husband. Through the centuries the justification of the marital privileges was always protection of the family and marriage, not a presumed unreliability of the spouse witness.

An example can be found in *The King v. Cliviger*.<sup>97</sup> The sole disputed factual issue in the case was the validity of James' marriage to Margery. There was evidence that James previously married Ellen. Ellen was still living when James and Margery married. Neither James, Margery, nor Ellen was a party to the suit.<sup>98</sup> At trial, the defense called Ellen. She was permitted, over objection, to testify that she and James had been married and that their marriage preceded that of James to Margery. Plaintiff lost and appealed. The sole issue on appeal was whether or not it was error to admit Ellen's testimony. There was no question of Ellen's being disqualified as incompetent. She was neither a party nor the spouse of a party. Nor did Ellen or James have any legal interest in the outcome of the suit.<sup>99</sup> Ellen was a competent witness, but was her testimony in violation of a privilege held by James?

[I]n all the books which treat evidence . . . certain . . . rules laid down . . . relate to husband and wife; and we find the general rule as to them to be founded, not on the ground of interest, but of policy; by which it is established that a wife shall not be

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comes to be conceded by the judges—first in criminal trials . . . and afterwards . . . in civil cases though not without ambiguity and hesitation.

8 WIGMORE, *supra* note 93, § 2250 (footnote omitted).

97. 2 Term. 263, 100 Eng. Rep. 143 (1788).

98. The law suit was for "settlement," *i.e.*, to determine the residency of paupers. Residency established the local community's obligation of support. It also might give rise to a right to recover for support provided. 2 Term. 263, 267-68, 100 Eng. Rep. 143, 146 (1788) (Ashurst, J., opinion).

99. *Id.* ("It has been long established, that the question of settlement raises no interest in the parties whose settlement is in dispute, therefore, I lay all consideration of interest out of the case.").

called to give testimony in any degree to criminate her husband . . . [S]he shall not be called even indirectly to criminate him.<sup>100</sup>

Nevertheless, the rule of Spousal Incompetency certainly reduced the number of cases in which the marital privileges might be invoked. The opposite was also true. When the rules of Party and Spousal Incompetency began to be abandoned during the last century, the number of cases in which a party might need to assert the marital privileges increased.<sup>101</sup> The essential point, however, remains: competency and privilege address separate issues. The Spouses' Testimonial Privilege is based upon a balancing of the need for evidence against the need to encourage and preserve stable families, not a presumption that the protected testimony was inherently unreliable.

*B. Is the Spouses' Testimonial Privilege  
the Result of Historical Gender Biases?*

Chief Justice Burger suggested the Spouses' Testimonial Privilege was the vestige of a legal cause abandoned by the Court in 1933. He is wrong. So are his suggestions that the rule's justification is dependent upon the predominant sexual roles of medieval England.

There is no doubt such archetypal roles existed and are unacceptable in contemporary American society. The Court's error lies in the assumption that such sexual stereotypes were the basis of the Spouses' Testimonial Privilege. As discussed above, whatever the gender-bias presumptions inherent in the rule of Spousal Incompetence, they never formed the theoretical justification of the Spouses' Testimonial Privilege. The privilege has always been equally applicable and available to wives and husbands. As early as 1684 Lord Jeffrey gave the rule a gender neutral formulation: "[A] 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 law rule that I thought it could not have borne any questions or debate."<sup>102</sup>

Nor was the privilege intended as a disguised ploy to protect husbands from responsibility for crime committed upon their wives. The privilege did not apply where one spouse was charged with a

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100. *The King v. Cliviger*, 2 T.R. 268-69, 100 Eng. Rep. 146 (1788) (Grose, J., opinion). This case and portions of the same passage were quoted in *Stein v. Bowman*, 10 L.Ed. (13 Pet.) 129, 135 (1839).

101. The same phenomenon occurred with the privilege against self-incrimination. The privilege was established in 1641. However, until 1878 the accused was barred from the stand in federal courts by the rule of Party Incompetency. Thus for almost 250 years, it was unnecessary to invoke the privilege against self-incrimination at trial.

102. *Lady Ivy's Trial*, 10 How. St. Tr. 557, 644 (1684).

crime against the other. This exception was recognized from an early date.<sup>103</sup>

There is no doubt that gender bias in favor of men and against women was a predominant theme in our culture throughout the development of the common law. Contemporary American society is marked by a strong movement towards achieving cultural, social, and economic equality for women. It is also true that gender-based stereotypes still are held by many in our society, and that gender-based discrimination continues to exist. It is hardly surprising that such discrimination is often found within marriage and family. Nevertheless, there is no inherent sexual bias in the desire to protect or the protection afforded the marital relationship by the privilege. The need for trust and loyalty in the relationship is not dependent upon how the partners see their personal roles within the family.<sup>104</sup> The Spouses' Testimonial Privilege is supported by a number of societal and personal values. They include: (1) the social importance of marriage and the family; (2) the individual spouses' rights of privacy and their expectation of shared privacy; and (3) the necessity of trust and loyalty to close interpersonal relationships. The last is not the result of *de jure* identity of interest based upon "medieval canons of jurisprudence,"<sup>105</sup> nor does it flow from any social or legal failure to recognize the individuality of either spouse.

Discarding the Spouses' Testimonial Privilege because it was created during a time when society sanctioned gender bias makes no more sense than arguing that the United States Constitution and Bill of Rights should be abandoned because they were written and interpreted so as to sanction slavery and racial discrimination.

### C. *Why Have Two Marital Privileges?*

Compared to the Spouses' Testimonial Privilege, courts have shown little tendency to confuse the policies supporting the Marital Communications Privilege with those underlying the rule of Spousal Incompetency. Nor has there been much confusion of the two marital privileges.<sup>106</sup> The year after abandoning the rule of Spousal In-

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103. Lord Audley's Trial, 3 How. St. Tr. 401, 402 (1631). (The wife was permitted to testify as the victim of a rape instigated by her husband. The exception was necessary, "otherwise she might be abused.").

104. *But see Kelly, Sister Love: An Exploration of the Need for Homosexual Experience, CONFRONTING THE ISSUES: SEX ROLES, MARRIAGE, AND THE FAMILY 70* (Kammeyer ed. 1975) (Reprinted from 21 *THE FAMILY COORDINATOR: JOURNAL OF EDUCATION, COUNSELING AND SERVICES* (Oct. 1972)) (suggesting the institution of marriage is irretrievably sexist).

105. *Trammel v. United States*, 445 U.S. at 43.

106. It does happen, however. For an example of a court and counsel apparently confusing the federal Spouses' Testimonial and the Marital Communications Privileges, see *Walker v. Lewis*, 127 F.R.D. 466, (W.D.N.C. 1989) (determining, due to the perceived disparity between the inability of the non-witness, party spouse to

competency in *Funk*, the Court expressly reaffirmed the Marital Communications Privilege in *United States v. Wolfe*.<sup>107</sup> In *Wolfe* the Supreme Court recognized the Marital Communications Privilege as being distinct from both the old rules of Party and Spousal Incompetency and the Spouses' Testimonial Privilege.

The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails . . . . Hence it is that the privilege with respect to communications extends to the testimony of husband or wife even though the different privilege, excluding the testimony of one against the other, is not involved . . . .

Communications between the spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged; but wherever a communication, because of its nature or the circumstances under which it was made, was obviously not intended to be confidential it is not a privileged communication . . . . And, when made in the presence of a third party, such communications are usually regarded as not privileged because not made in confidence

. . . .<sup>108</sup>

As noted above, the Spouses' Testimonial and Marital Communications Privileges differ in both scope and application. But why have two marital privileges? The answer is that each is intended to accomplish a different goal. Both reflect the high societal value placed on marriage and the family, yet each seeks to foster and protect a distinct aspect of marriage. Indeed, the Marital Communications Privilege can be understood as intended to foster stable marriages. The Spouses' Testimonial Privilege, on the other hand, is intended to protect existing marriages from destructive interventions by the state.

The need for communication between spouses has long been recognized as a prerequisite for a successful and lasting relationship. The primary purpose of the Marital Communication Privilege is to foster stable marriages by assuring the privacy of marital communications. The possibility that such communications might be made public would cause a chilling pall upon all marriages. This same proposition applies to all other evidentiary privileges intended to protect the privacy of communications. Like those other privileges,

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assert the privilege under *Trammel*, whether a state statutory version of the Marital Communications Privilege or the federal Spouses' Testimonial Privilege was controlling during discovery of federal claims and pendant state claims).

107. 291 U.S. 7 (1934).

108. *Id.* at 14-15. The Marital Communications Privilege was again affirmed by the Court in *Blau v. United States*, 340 U.S. 332 (1951).

the Marital Communications Privilege fits nicely within Dean Wigmore's oft-quoted criteria for defining such privileges.<sup>109</sup>

The Spouses' Testimonial Privilege is not intended to foster confidential communications within the marriage. The Spouses' Testimonial Privilege prevents one spouse from being the instrument of harm to the other. It is intended to protect the marriage from direct assaults upon the marital relationship by strangers to the marriage, including the state and courts. Beyond the benefit realized from minimizing the risk to the marriage in question, the privilege also stands as a broad affirmation of the high societal value placed on marriage and family.

Clearly, the benefits provided by the marital privileges overlap. The Marital Communications Privilege also serves to protect marriages from a destructive betrayal of trust. Similarly, the Spouses' Testimonial Privilege also has the effect of nurturing marriages by fostering a sense of shared privacy between spouses.<sup>110</sup>

The Court in *Trammel* also found the scope of the Spouses' Testimonial Privilege unique among the evidentiary privileges. It noted: "The *Hawkins* privilege is invoked, not to exclude private marital communications, but rather to exclude evidence of criminal acts and of communications made in the presence of third persons. No other testimonial privilege sweeps so broadly."<sup>111</sup> The Court's observation is almost correct. Most other evidentiary privileges are based upon recognition of the importance of confidentiality to socially important relationships. This includes the Marital Communications Privilege. Like other modern evidentiary privileges, it is limited to confidential communications within a specified relationship.

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109. The criteria are:

1. There must be an expectation of confidence at the time of the communication.
2. Confidential communications must be essential to the relationship.
3. The relation between the communicants must be one which society wishes to be "sedulously fostered."
4. Injury to the relation by disclosure must outweigh the benefit to the litigation.

See 8 WIGMORE, *supra* note 93, § 2285.

110. For a discussion of the marital privacy interests balanced against the rights of the press under the First Amendment, see *Scheetz v. The Morning Call, Inc.*, 747 F. Supp. 1515 (E.D. Pa. 1990) (police officer and wife brought action against newspaper reporter after newspaper stories based on information contained in confidential police report were published; on motion of newspaper and reporter for summary judgment, the District Court held that rights of newspaper and reporter under press clause of First Amendment outweighed privacy rights of police officer and his wife).

111. *Trammel v. United States*, 445 U.S. at 51. Today, the availability of the Marital Communications Privilege in circumstances similar to those in *Trammel* is also problematic. See, e.g., *United States v. Dowdy*, 738 F. Supp. 1283 (W.D. Mo. 1990) (referring to fact that a number of courts have held that the marital privileges are not available where the spouses jointly participated in criminal activity).

The Spouses' Testimonial Privilege goes beyond protection of confidential communications within the subject relationship. It extends to all testimony, things seen as well as things said in confidence. It extends to public acts witnessed by the spouse, as well as those done in private. It even extends to things known by the witness spouse before the marriage. All other privileges permit only prevention of relevant testimony about confidential communications within the protected relationship. The Spouses' Testimonial Privilege prevents all testimony against the party spouse.<sup>112</sup>

There is, however, another evidentiary privilege that has a scope as broad as that of the Spouses' Testimonial Privilege—the Privilege against Self-Incrimination. The Privilege against Self-Incrimination and the Spouses' Testimonial Privilege are broader than other privileges for exactly the same reason—they both are designed to protect something other than the confidentiality of communications. They both seek to protect a source of evidence, rather than a type of communication.

The breadth of the Spouses' Testimonial Privilege is also supported by a recognition that the marriage relationship is different from all the other relationships protected by evidentiary privileges.<sup>113</sup> Marriage is a more pervasive relationship than any other granted the protection of an evidentiary privilege. It is more pervasive on both the social and personal scales. More people are, have been, and will be involved in the marriage relationship than in almost any other within our society. For better or worse, nuclear families and the marriages they spawn, continue to provide the predominant elemental social structure of our culture.

The attorney/client, doctor/patient, and all other relationships protected by evidentiary privileges are inherently limited. They involve a single aspect of the individual's life. Marriage has a far broader and deeper impact on the lives of the people involved. It touches most, if not all aspects of both persons' lives. Not only is the subject matter of the marital relationship broader, the degree of

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112. Traditionally the Spouses' Testimonial Privilege was said to protect only testimony adverse to the witness' spouse, hence the name "Anti-Marital Facts Privilege." However, this appellation is as misleading as it is clumsy. The privilege had to be invoked by one of the spouses. Once invoked, it was presumed the testimony would be adverse. Opponents do not offer, and parties do not object to, favorable testimony. A similar presumption is apparent in the conversion of the old hearsay exception for "admissions against interest" into the exclusion of "admissions by a party opponent" in the definition of hearsay under FED. R. EVID. 801(d)(2). This presumption is to be distinguished from the "statements against interest" exception recognized under Rule 804(b)(3).

113. See Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593 (1987) (arguing that the "atomistic" focus on individual rights in considering privacy issues ignores the real and socially valuable sharing of privacy and expectations of loyalty in a host of personal relationships).

contact runs deeper. You visit your lawyer and doctor. You live with your spouse.

Marriage also differs from the other relationships protected by evidentiary privileges in another pertinent respect. In today's society, the relationship is mutual. The obligations and rights of each are reciprocal in a way that is not true of any of the other relationships. The Attorney-Client Privilege protects the interests of clients, not lawyers. The Doctor-Patient Privilege protects patients, not doctors. The marital privileges are intended to protect the interests in the relationship of both parties, wives and husbands. The very changes in the societal expectations of marriage noted by the Court in *Trammel* distinguish the marital relationship from all others enjoying an evidentiary privilege.

The breadth, depth, and mutuality of the marital relationship are the factors that distinguish it from all others. Arguably, such factors might also justify the broader and deeper protections afforded by the Spouses' Testimonial Privilege.

Justice Black's opinion in *Hawkins*<sup>114</sup> is not caused by a failure to notice that women were no longer "regarded as chattel or demeaned by denial of a separate legal identity . . ." <sup>115</sup> Justice Black and the Court majority concluded that the need to protect the marital relationship had not diminished over the centuries, notwithstanding changes in sexual roles within and outside the family. Stripped of its appeal to political correctness, the *Trammel* opinion suffers from confusion over the distinction between competency and privilege. This led the Court to confuse the very different historical policies underlying each.

However, none of the flaws in the *Trammel* opinion mandates a different outcome. As Dean Wigmore remarked about the privilege against self-incrimination: "The history of the privilege does not settle the policy of the privilege."<sup>116</sup> The decision might still be justified. Has society's interest in protecting marriage and the family changed? Have the courts' needs for "every [one's] evidence" increased?

#### IV. COMPETING SOCIAL VALUES

We turn now to consider the essence of all evidentiary privileges: achieving an appropriate balance between competing social values. The Court in *Trammel* said: "Here we must decide whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of . . . justice."<sup>117</sup> Underlying this statement of

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114. *Hawkins v. United States*, 358 U.S. 74 (1958).

115. *Trammel v. United States*, 445 U.S. at 52.

116. 8 WIGMORE, *supra* note 93, § 2251.

117. *Trammel v. United States*, 445 U.S. at 51.



the question is the assumption that "the public . . . has a right to every man's evidence."<sup>118</sup> All relevant evidence is presumed necessary. The burden of persuasion rests with those who would subject the court's need for evidence to some other social value. All other values will be given primacy only if they demonstrably outweigh the need for evidence.<sup>119</sup>

This is the traditional definition of the problem, a definition formulated by judges and legal scholars. It is hardly surprising that it begins with the presumption that courts have a *need* for and *right* to compel all evidence from all sources. A functionally objective analysis might suggest an opposite hypothesis. For example: Testimony is compellable only where the need for the evidence is sufficiently important to outweigh the societal costs of producing the evidence.

No one would seriously argue for a rule requiring all litigants to establish that the need for evidence outweighs the costs of production in every instance. There is a strong societal interest in administering justice based on factual truth. The need for probative evidence to achieve this end clearly outweighs the normative societal costs of compelling attendance and testimony by parties and non-party witnesses. Nevertheless, ignoring the underlying presumption can have an unintended consequence. The legal profession tends to forget that the administration of justice is not the paramount value of our society.<sup>120</sup>

#### A. *A Debate Without Data: Testing the Breeze with Wetted Finger*

The *Trammel* Court considered four issues when weighing the social costs and benefits of the Spouses' Marital Privilege, two on each side of the scales. Benefits considered are (1) the courts' need for evidence and (2) the government's need for spousal testimony in criminal cases. Costs considered are (1) the importance of marriage and family relationships and (2) the protection provided to those relationships by the Spouses' Testimonial Privilege. We shall consider each of these issues in turn. Before doing so, however, a few observations about the limitations on this approach are appropriate. The basic approach is that of a cost-benefit analysis. Theoretically this type of empirical social accounting is an appropriate method of "weighing" the competing social needs, but there is a problem.

118. *Id.* (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

119. *Id.* at 50 (citing *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) and *United States v. Nixon*, 418 U.S. 638, 709-10 (1974)). See also 8 WIGMORE, *supra* note 93, § 2285 (privileges are an exception to the general principle that all persons must give evidence and are justified only by the "preponderance of extrinsic policy").

120. See Note, *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1479-80 (1985) (arguing that because of the lack of social cost-benefit data on privilege, "placement of the burden of justification can effectively determine whether or not a privilege is recognized").

Although the empirical critique's attention to the actual effects of privileges is commendable, its conclusions are generally overstated. First, although the benefits attributable to privileges are difficult to estimate, there is little reason to assume that they are necessarily small. Second, the critique mistakenly adopts Wigmore's assumption that the costs imposed by privileges are "plain and concrete." In fact, these costs are no easier to estimate than the benefits. Third, no solid empirical data exists to support the estimates of either critics or proponents as to either the costs or the benefits of privileges. In short, legal decision makers face a perhaps unavoidable empirical indeterminacy.<sup>121</sup>

The *Trammel* opinion refers to no empirical data directly measuring either the cost or benefits of the Spouses' Testimonial Privilege.<sup>122</sup>

Another problem lurks in a court's attempt to adapt the cost-benefit analysis tool of social science to its own legal purpose. Social science and the courts both seek the truth, but, as Professor Tanford points out, they often pursue a different truth. "Scientific truth is general, probabilistic and arrived at over time. Legal truth is individualistic, may be improbable and must be determined immediately."<sup>123</sup>

These dichotomies are here in *Trammel*. The question of privilege in *Trammel* was raised in a drug conspiracy trial. It is unlikely either counsel came to court prepared to offer evidence on the relative societal value of the court's need for evidence and the institution of marriage. However important the issue, the trial judge would be expected to resolve it quickly. In the normal course of events the trial court's decision and, therefore, the appellate record, is not likely to contain scientific analysis. Instead, it comprises conclusory arguments based on common law, common sense, and subjective opinions drawn from the anecdotal experiences of counsel and the trial judge.

The simple fact is that courts are not intended to be policy-making institutions. Federal judges are appointed to administer the rule of law. Policy formulation is neither the primary nor usual function of the courts. Court procedures are simply not designed to develop and decide policy issues. When forced to the task, a court makes

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121. *Id.* at 1474-75 (footnotes omitted).

122. *Trammel v. United States*, 445 U.S. at 48-50. The *Trammel* Court did engage in a survey of the treatment of the privilege by state courts and legislatures. A survey can produce empirical data, but the data produced in *Trammel* is limited to the way in which other courts have decided the issues. It says nothing about the assumptions or data upon which those decisions were based.

123. J. Alexander Tanford, *The Limits of Scientific Jurisprudence: The Supreme Court and Psychology*, 66 *IND. L.J.* 137, 168 (1990) (examining the tendency of courts to disregard or distort empirical data from the social sciences concerning jury behavior).

policy like a hammer drives a screw. It can be done, but the process is risky and the results dubious.<sup>124</sup>

It is unlikely that empirical data sufficient to engage in a true cost-benefit analysis will be available in the foreseeable future. Courts will continue to be forced to determine the relative costs of the competing social values based upon circumstantial evidence. The same limitations apply to assessment of the benefits accruing to those values.

The Court faced more than a lack of data when confronted by Mr. Trammel's appeal. The United States had voiced no federal policy on the family and marriage. Less than five years earlier Congress had attempted but failed to agree on an appropriate balance of societal values in the Spouses' Marital Privilege.<sup>125</sup> It is hardly surprising that the Court's examination of the privilege in *Trammel* is based largely upon abstract logical analysis applied to unverified and often unspoken assumptions.

We turn now to consider the Court's efforts to assess the social values at stake and the effect of the Spouses' Testimonial Privilege.

### B. *The Court's Need for Evidence*

The Court acknowledges that the social value of administering justice is finite. This principle is the basis for all evidentiary privileges.<sup>126</sup> It is also necessary to remember that the need for relevant evidence is not theoretically insatiable. Federal Rule of Evidence 403 is based upon a recognition that the need for evidence is finite. Beyond unfair prejudice, relevant evidence may be excluded for matters as mundane as social and judicial economy.<sup>127</sup> Rape shield laws and hearsay exceptions intended to preclude the need to produce child abuse victims provide additional examples of accepted

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124. The need for, and historically late development of, the Brandeis brief demonstrate the *ad hoc* context of attempts to remedy the functional limitations faced by courts confronted with a need to create public policy.

125. WEINSTEIN, *supra* note 43.

126. *Trammel v. United States*, 445 U.S. at 51.

127. FED. R. EVID. 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Similarly, motions for protection from discovery are often decided by balancing the social cost of production against the evidentiary forensic benefit. The issue is directly raised by FED. R. EVID. 403, which permits exclusion of relevant evidence based on "considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403 of course preserves the Wigmorean bias by permitting exclusion only when the probative value is substantially outweighed by these extraneous concerns.

limitations on the need for relevant testimony.<sup>128</sup> The law has always recognized that some evidence is not worth the effort or cost.

Nowhere does the *Trammel* Court consider what evidence might be obtainable only from a defendant's spouse. Foremost in this category would be words spoken in confidence—communications also protected by the Marital Communications Privilege. Unlike private marital communications, public exchanges are not lost to evidence by the imposition of either privilege; the witness spouse is not the only possible source of evidence for public acts or communications by the defendant. However, a private exchange can be lost to evidence if the spouse does not testify. What is the evidence lost to the court through the Spouses' Testimonial Privilege? It is evidence of the defendant's private acts witnessed only by defendant's spouse. Although evidence in this category may have been given by Elizabeth Trammel at her husband's trial, none is apparent on the appellate record. The trips to the Far East were public and subject to proof by others, including immigration and customs officers. His hidden purpose and surreptitious importation of drugs also were known to others.

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128. FED. R. EVID. 412 provides in relevant part:

- (a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible.
- (b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is —
  - (1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or
  - (2) admitted in accordance with subdivision (c) and is evidence of —
    - (A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or
    - (B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged.

Although only a few states have adopted a recognizable version of the Federal Rule, all but two states have some provision shielding victims of rape from inquiry into their sexual practices and history. 1 GEORGE P. JOSEPH & STEPHEN A. SALTZBURG ET AL., *EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES*, ch. 22, at 2-3 (1990). For an example of an exception to the hearsay rule, see *ME. REV. STAT. ANN.*, tit. 15, § 1205 (West Supp. 1994), referring to certain out-of-court statements made by minors describing sexual contact. The effect is to eliminate the factfinder's ability to observe the victim's demeanor while testifying.

The Court's opinion in *Trammel* suggests the passage of time may create the need for change.<sup>129</sup> The opinion offers no discussion of the effect of scientific, technical, and other forensic developments on the need for spousal evidence. The implicit assumption of *Trammel* is exactly the opposite, that there has been no change in the forensic need for spousal evidence during the last one hundred fifty years. The *Trammel* opinion assumes the Spouses' Testimonial Privilege is as much an impediment to the pursuit of truth as ever it was: "As Jeremy Bentham observed more than a century and a half ago, such a privilege goes far beyond making 'every man's house his castle,' and permits a person to convert his house into a 'den of thieves.'" <sup>130</sup> Bentham's argument is premised upon an assumption that the home is an impenetrable fortress of privacy. Jeremy Bentham may have been correct in 1827. Until this century, law enforcement lacked the technical means to penetrate the close of the family home. Events inside the home were often known only to the defendant and spouse. The privilege against self-incrimination nailed shut the front door.<sup>131</sup> The Spouses' Testimonial Privilege boarded up the back.

Times have changed. Law enforcement's need for spousal testimony is less today than it was in Jeremy Bentham's time. It is now possible to surreptitiously witness and record events within homes and other private spaces.<sup>132</sup> Other advances in forensic science also decrease the need for spousal testimony by providing alternative avenues of proof.

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129. One example of a social force with potential for impact on spousal testimony requirements is the perceived need to convict more felons and thereby win the "War on Crime."

130. *Trammel v. United States*, 445 U.S. at 51-52 (quoting 5 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 340 (1827)).

131. U.S. CONST. amend. V. Jeremy Bentham also "aimed his rhetorical guns at the privilege against self-incrimination," causing "a good deal of debate about its desirability." William Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1232 (1988). Professor Stuntz suggests that the rules and limitations of the privilege against self-incrimination are viewed as "simply inexplicable." *Id.* at 1228. He concludes there is merit to the view that "no good theory" explains the case law of the Fifth Amendment. *Id.* However heated the debate, the privilege against self-incrimination is well insulated by the Fifth Amendment. The marital privileges, however, have no such protection. The reason for this difference may have more to do with timing than with the framers' intent. When the Bill of Rights was written, the marital privileges were accepted fixtures of the law. The privilege against self-incrimination was not. It is possible that the inclusion of the latter in the Bill of Rights was because the drafters wanted to assure the same status as the marital privilege. 8 WIGMORE, *EVIDENCE* § 2250, at 292-94 (McNaughton rev. 1961) (self-incrimination was not recognized in all colonies and was included in the Bill of Rights in awareness of its tenuous acceptance).

132. Although beyond the scope of this Article, another line of inquiry might include comparison of evidentiary privileges with limits on investigatory information gathering due to privacy concerns with limits on the compulsion of testimony conveying the same information.

There is no convenient method of quantifying the impact of such advances upon the need for spousal testimony. There are limitations on the use of these technical advances. Court approval is necessary. Approval is generally available only after law enforcement already has probable cause to suspect criminal activity. Technical and personnel resources also limit technological evidence-gathering. For the foreseeable future, it is unlikely that law enforcement will be able to fully exploit the available technology in any but the most serious cases.

Nevertheless, it is clear the need for evidence—from any source—is not constant. A lack of definitive data on changes in the need for such evidence is not justification for ignoring that such changes occur. There is an explanation for the Court's failure to pause as it passed by 150 years of scientific, technical, and forensic progress. It was in a hurry to reach another issue, an issue outside the traditional calculus of privilege justification.

### C. *The War on Crime*

The focus of the Court's concern in *Trammel* is apparent in its reference to the ideas of Jeremy Bentham. The Court adopted Bentham's assertion that the privilege has the potential to convert the family home into a "den of thieves."<sup>133</sup> The Court also agreed with Bentham's assertion that the privilege "secures, to every man, one safe and unquestionable and ever ready accomplice for every imaginable crime."<sup>134</sup>

The entire *Trammel* opinion resonates to a chord of concern over the problem of crime in our society. The focus is not upon the courts' "need for probative evidence in the administration of justice."<sup>135</sup> Instead, the Court's focus is on the evidentiary needs of law enforcement.<sup>136</sup> This is an astounding shift in approach away from the traditional analysis of evidentiary privileges. Even more remarkable is the Court's failure to notice or, at least, remark upon the change.<sup>137</sup>

The Supreme Court's hearkening to Bentham's rhetoric is appropriate, although in an undoubtedly unintended way. Jeremy Bentham's public life spanned the late Georgian period in England. He

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133. *Trammel v. United States*, 445 U.S. at 51-52 (quoting 5 RENTHAM RATIONALE OF JUDICIAL EVIDENCE 340 (1827)).

134. *Id.* at 52.

135. *Id.* at 51.

136. "This modification . . . furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs." *Id.* at 53.

137. For a recent reverberation of this change see *In re Grand Jury Investigation*, 918 F.2d 374 (3rd Cir. 1990) (applying to the Clergy Privilege the general rule that evidentiary privileges should be narrowly construed, especially in criminal proceedings).

died on the threshold of the Victorian age.<sup>138</sup> For all of his reforming zeal, Bentham was a creature of his times. Robert Hughes draws a portrait of Bentham's England which is hauntingly familiar to modern eyes.

[T]he rising crime-rate—or rather, the belief that it was rising—became a potent issue. Accordingly, the Georgian legislators fought back against a threat which they believed came from a whole class . . . . Georgian fear of the “mob” led to Victorian belief in a “criminal class . . . .”

The idea of a criminal class, as understood by the English in the 1830s, meant that a distinct social group “produced” crime, as hatters produced hats or miners coal. It was part mob, part tribe and part guild, and it led a subterranean existence below and between the lower social structures of England. . . .

The fear of crime itself cast an exaggerated solidity on “the distinct body of thieves, whose life and business is to follow up a *determined warfare against the constituted authorities*” and who “may be known almost by their very gait in the streets from other persons . . . .”

The idea that, in the words of a colonial judge in the 1850s, “crime *descends*, as surely as physical [appearance] and individual temperament,” was the very axis of the idea of a criminal class; it was also, of course, the key reason for all social discrimination . . . .

. . . What was the cause of crime? Criminals, who manufactured or, rather, secreted it from their inner nature, as snakes their venom or eels their slime.<sup>139</sup>

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138. Jeremy Bentham lived from 1748 to 1832. JEREMY BENTHAM, 5 RATIONALE OF JUDICIAL EVIDENCE, (Earland Publishing 1978) (1827). Queen Victoria reigned from 1837 to 1901.

139. ROBERT HUGHES, THE FATAL SHORE (1987) (a history of the settlement of Australia by convicts transported from England). Although initially reluctant, the English eventually felt compelled to incur whatever risks an organized police force carried to personal liberty. Peel's Police Act was enacted in 1829. *Id.* at 26. The result was a sharp increase in the number of prisoners. Although there was much contemporary concern over increase in the rate of crime, it now appears the dramatic increase in convicts resulted from more efficient detection and prosecution. *Id.* at 164.

The idea of biological linkage “has a long history . . . . Law violators were described as a distinct physical type [recognizable] at birth with distinct physical features . . . . This conceptualization had extensive impact on criminology and social policy for over a third of a century, but current-day scientists have accumulated sufficient evidence to reject it. RITA WICKS-NELSON & ALLEN C. ISRAEL, BEHAVIOR DISORDERS OF CHILDHOOD 165 (2d ed. 1991). Unfortunately, similar perceptions tempt to similar generalizations. The issue of biological causes for criminal behavior has not been abandoned. The temptation to leap to biological conclusions can be irresistible for some. Skin color is more readily identifiable than peculiarities of gait. What is more, there is no denying that racial differences are based on genetic differences. Current studies suggest an “increased genetic link” in antisocial behavior that persists through adolescent delinquency into criminal behavior as an adult. This has led to a new crime-genetics hypothesis and a call for additional research. *Id.* (citing

Contemporary attempts to stem the rising tide of crime also seem to parallel those of Georgian England. Law enforcement relied heavily upon informants induced to cooperate through rewards.<sup>140</sup> The courts also came in for criticism. The entire judicial system seemed soft on crime.

There was distress at the "tenderness" of the English legal system . . . Georgian justice may look fierce to us, but seen from Europe then it was lenient. The suspect . . . could not be tortured until he confessed; he could not be held indefinitely without bail or trial; and he was innocent until proven guilty. The liberalism of English Common Law . . . astonished European visitors. They noticed that, although it reduced the likelihood of an innocent man's conviction, it also made it easier for the guilty to escape [punishment].

The English knew this, too; hence the draconic laws they created to avenge their sense of a disturbed social order. Against the relative fairness of British trials, one must set the most striking aspect of Georgian law—the sheer scope of its capital statutes.<sup>141</sup>

By 1819, the preceding 150 years had seen the enactment of almost 200 new criminal statutes prescribing capital punishment. There was also a growing tendency to eliminate judicial discretion in sentencing.<sup>142</sup> "Such legislation was part of a general tendency in eighteenth-century England: the growth of the Rule of Law . . . into a supreme ideology, a form of religion which, it has since been argued, began to replace the waning moral power of the Church of England."<sup>143</sup>

What Bentham hoped to achieve by abrogating the Spouses' Testimonial Privilege is clear from the unquoted portions of the paragraph cited by the Court in *Trammel*. He argues that without the

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Michael Rutter et al., *Genetic Factors in Child Psychiatric Disorders—II. Empirical Findings*, 31 J. OF CHILD PSYCHOL. AND PSYCHIATRY 39 (1990).

A similar approach is reflected in a recent report from the United States Justice Department. It recently released a study showing that persons convicted of committing crimes are more likely to have relatives who were also convicted of crimes than are "other" persons. The media, and even academic reaction to the study is thoroughly Georgian. "Some [leading] criminologists say that the figures provide striking new evidence for the theory that criminality tends to run in families, particularly those of more violent criminals." *Crime Runs in Families, Data Show*, MAINE SUNDAY TELEGRAM, Feb. 9, 1992, at B11. One criminologist is quoted as saying: "This shows that where you really learn delinquency is from your family." *Id.* See also WICKS-NELSON & ISRAEL, *supra* at 160-83 (citing studies supporting "widespread agreement" that delinquency and other behavior disorders in children are strongly influenced by the family).

140. HUGHES, *supra* note 138, at 26-27. ("The pickings were large enough to support a whole subclass of informers, police narks and thief-takers.")

141. *Id.* at 28-29.

142. *Id.* at 29-31.

143. *Id.* at 29 (footnote omitted).



privilege "a man could not carry on schemes of injustice, without being in danger, every moment, of being disturbed . . ." by his wife—and also subject to the risk of being "betrayed and exposed to punishment,—by his wife."<sup>144</sup> If this were the policy, Bentham predicted that crime would "be rare."<sup>145</sup>

Bentham's presumption that the Marital Privilege converted the home from castle to dark tower of evil makes perfect sense—given the assumptions of a criminal class and its inherently evil nature. Moreover, the righteous do not need the benefits of such a privilege. They are not likely to find themselves in the dock where the privilege might prove important.

Nor is it surprising that a modern ear might find some appeal in Bentham's argument. Today we share similar perceptions. We seem to be inundated by a cresting wave of crime. Substitute suburbia for town house, drugs for gin, confidential informants for thief takers, and you have a description many Americans would recognize as a portrait of our times.

Certainly, crime is a fact of modern life. Forty-two percent of all Americans will be victims of violent crime at least once after the age of twelve. Ninety-nine out of one hundred will be victims of personal theft. Eighty-seven percent of us will be victims of theft three or more times. Homicide is the eleventh leading cause of death in our country. For Americans between the ages of fifteen and thirty-four, it is the second leading cause of death.<sup>146</sup> There is little wonder that law abiding citizenry might develop a siege mentality. The authorities have been unable to build an effective dike. Nor have we been able to stem the flood at its source.

Similar perceptions also suggest similar solutions. Law enforcement budgets have increased on both the federal and local levels. We have seen a resurgence in the willingness to inflict capital punishment. In 1994 Congress enacted and the President signed a crime bill creating sixty new capital crimes.<sup>147</sup> The new Federal Sentencing Guidelines are rarely referred to without the adjective "stiff." Even the Georgian House of Lords would be impressed. In June of 1994, the prison population in the United States grew to over one million. Another 450,000 were inmates in local and county jails.<sup>148</sup>

If there is a lesson to be learned from Georgian England, it is that increased convictions and ever more drastic penalties are ineffective in stemming social disorder. Georgian England managed to survive

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144. JEREMY BENTHAM, *supra* note 137, at 339-40.

145. *Id.* at 340.

146. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 28-29 (2d ed. 1988).

147. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

148. *State and Federal Prison Population Tops One Million*, U.S. Dep't of Justice, BJS 202-307-0784 (Oct. 27, 1994).

into the social tranquility of its Victorian and Edwardian times with the marital and other evidentiary privileges intact. Furthermore, the national experience of Australia represents an immense obstacle to any theory of criminality based on genetics or of familial subculture.

Notwithstanding the initial disclaimer, there is some empirical data available that bears indirectly on this aspect of the problem. The data does not permit a precise calculus of the costs to law enforcement of the privilege. It does, however, provide an interesting perspective. The beneficence of Congress and energy of the Justice Department have produced a plethora of statistical data on crime. United States law enforcement has adopted a "body count" measure of success. These statistics have some uses beyond justifying the vast infusion of resources into law enforcement and the current need for more. If they prove anything, it is that the perceived failure to win the War on Crime does not lie in an inability to convict and imprison.

Federal prosecutors are efficient in convicting those they prosecute with or without *Trammel*. Their conviction rates were 76.4% in 1980, when *Trammel* was decided. The rate increased only 3.5% over the next five years. There is no evidence suggesting that even this small increase resulted from the change wrought in *Trammel*. The high conviction rate does, however, suggest an outer limit for the possible gain to law enforcement. From 1986 through 1989, the conviction rate hovered at about 81%. During the same period, the number of cases dismissed went down. In 1980, 19.7% of all cases in U.S. District Courts were dismissed. The number of dismissals declined to 17.1% in 1985 and has wandered between 15.4% and 16.1% for the years 1986 through 1989.<sup>149</sup> An overall conviction rate of 80% would seem close to the theoretical maximum for any system requiring proof of guilt beyond a reasonable doubt.

Nor does the high level of plea bargains result in meaningless penal consequences for defendants. According to the Department of Justice, 71% of all persons convicted of felonies are incarcerated, 37% for more than one year.<sup>150</sup> As a result more than 2,600,000

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149. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, FEDERAL CRIMINAL CASE PROCESSING, 1980-87, at 10-12 (1990). It is not clear what percentage of the dismissals were in exchange for guilty pleas to other charges. The conviction rates of federal prosecutors are comparable to those of the state attorneys general and the local district attorneys. The median among a sampling of 26 jurisdictions was a conviction rate of 73% for cases tried in the states' felony courts. The range ran from a high of 88% in Dallas to a low of 52% in Rhode Island. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 84 (2d ed. 1988). The Department of Justice reports most cases brought by state prosecutors result in conviction by guilty pleas. A sampling of 28 jurisdictions shows a range from 82% in Los Angeles down to 26% in Philadelphia. The mean among those surveyed was 62.5%. *Id.* at 83.

150. *Id.* at 97.

adults were under correctional care, custody or supervision in 1988. This number represented 1.5% of the entire adult population. The percentage of males in custody is higher. The percentage of black males in custody is higher still.<sup>151</sup> The numbers are higher for juveniles. In 1985, about 3% of all the children in our country were in custody.<sup>152</sup>

Starting in about 1973, the number of persons in prison in the United States reached a new high every year. As noted above, the current number of prison inmates passed one million in 1994.<sup>153</sup> The percentage of the population in prison also reached new highs each year. It is fair to assume the number would have been even higher but for a lack of available cell space. The probation population was growing at a slightly faster rate. By 1985, one of every ninety-four people you passed on the street was likely to be on probation.<sup>154</sup>

Since 1990 federal prosecutors have increased the percentage of those who are sentenced to prison and the length of their sentences. In 1980, 46% of all persons convicted in federal court were sent to prison for an average prison sentence of 44.3 months. By 1989, the percentage of those sent to prison had grown to 58.5%. By then, the average sentence increased to 53.4 months.<sup>155</sup> All of these numbers will increase as an ever greater proportion of the current prison population comprises individuals sentenced under the Federal Sentencing Guidelines.

The available data suggest that any social benefit realized from increased empowerment of prosecutors is likely to be statistically insignificant. The gain or loss of adverse testimony by the defendant's spouse is unlikely to prove the straw that breaks the back of crime. We already have convicted and imprisoned a higher percentage of our population than any other nation in the world. The British experience in the last century and our lack of a subcontinent to which we can conveniently exile an even higher percentage of our population suggest we might do better by seeking other solutions. Certainly, the prospects for improvement do not warrant putting law enforcement at the pinnacle of our social values.

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151. *State and Federal Prison Population Tops One Million*, *supra* note 147 (reporting 43 women per 100,000 population were prisoners versus 719 men per 100,000 population; 116 per 100,000 white residents were prisoners versus 1,432 per 100,000 black residents).

152. BUREAU OF JUSTICE STATISTICS, *supra* note 148 at 102-03.

153. *State and Prison Population Tops One Million*, *supra* note 147.

154. *Id.* at 104.

155. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *supra* note 148, at 16-17.

*D. Marriage and the Family*

The *Trammel* Court's examination of the extrajudicial side of the scale was a two-fold analysis. First, it looked for changes in the importance of marriage and the nuclear family. Second, the Court considered the efficacy of the privilege in accomplishing its intended purpose.

We can duplicate the actual analysis without wasting much paper. First, the Court noted that the family, home, and marriage were "already subject to much erosion in our day."<sup>156</sup> The societal value of marriage was implied in the Court's conclusion that, because of such "erosion," caution was warranted.<sup>157</sup>

The Court then noted the absence of a federal policy on families and the traditional deference to the states on such issues. The Court remarked that just over half of the state legislatures or courts had limited or abolished the Spouses' Testimonial Privilege.<sup>158</sup>

Having finished with its examination of the value of marriage and family as social institutions, the Court turned to consider the impact of the Spouses' Testimonial Privilege on them. The Court said there was "little in the way of marital harmony for the privilege to preserve" if one spouse could be induced to testify against the other merely to avoid a lengthy prison sentence.<sup>159</sup> Following Alice through the looking glass, the Court argued that the privilege actually destroyed marriages. The privilege permitted the party spouse to send the witness spouse to prison by depriving him or her of the opportunity to become a government witness.<sup>160</sup> In the Court's estimation, the change would not encourage the government to pit spouses against one another, since it was already free to do so under the existing law.<sup>161</sup> The Court concluded that its change to the Spouses' Testimonial Privilege would not impair its purpose of furthering marital harmony.<sup>162</sup>

We shall utilize a parallel if slightly broader approach. We also have the benefit of fifteen years hindsight. As already mentioned, there was no federal policy on families and marriage for the Court to implement. Nor could the Court ignore the problems experienced with adoption of the Federal Rules of Evidence. The political lesson seemed to be that the traditional consensus supporting the marital privileges had eroded. In Congress at least, it seemed that both proponents and opponents of the privilege were a minor-

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156. *Trammel v. United States*, 445 U.S. at 47-48.

157. *Id.*

158. *Id.* at 48-50.

159. *Id.* at 52.

160. *Id.* at 52-53.

161. *Id.* at 52 n.12.

162. *Id.* at 53.

ity. Nor was there a middle ground which could command a majority.

### 1. *Shifting Breezes*

The Court approached the issues raised in *Trammel* at what appears in retrospect to have been a watershed in social and political thought about family and marriage. The case was argued in 1979 and decided in the second month of the new decade. The experience of the 1970s seemed to confirm that of the 1960s. Many of the social changes, especially those associated with the Sexual Revolution, were more than transient fads. The first AIDS cases in America were not reported by the Centers for Disease Control until June 1981.<sup>163</sup>

At the time the Court considered Mr. Trammel's appeal, there was deep-seated confusion over the viability, importance, desirability, or future of the nuclear family and traditional marriage. In the words of Bruce Hafen, there was "a growing sense of uncertainty about the place of the formal family in our hierarchy of national values."<sup>164</sup> Hafen noted a dearth of "legal and other literature [examining] . . . the broad social policies underlying the preference historically given by the law to family relationships."<sup>165</sup> He found the absence of such material remarkable. Especially when compared to the amount of scholarly effort devoted to individual rights. As a result "the case law and other commentary on our traditional as-

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163. H. ROBERT MALINOWSKY & GERALD J. PERRY, AIDS INFORMATION SOURCE BOOK, 1 (1989).

164. Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 465 (1983). See also RICHARD H. KLEMER, MARRIAGE AND FAMILY RELATIONSHIPS 19 (1970) ("All the professional observers of the American family agree that there have been many changes in recent times in family experiences and family roles. There most agreement ceases.") Klemmer cites a survey of eighteen experts taken in the 1940s. Each was asked to list the most significant changes in the experience of American families. "The lack of unanimity in the replies was impressive. The group reported a total of sixty-three changes, but only one change, the increasing divorce rate, was reported by all. Only eight changes were mentioned by at least half the experts."

The eight changes were (1) increasing divorce rate (mentioned by all eighteen); (2) wider diffusion of birth control and/or decline in family size (mentioned by 12); (3) decline in authority of husbands and fathers (mentioned by twelve); (4) increased sexual intercourse apart from marriage (mentioned by eleven); (5) increase in the number of wives working for pay (mentioned by eleven); (6) increasing individualism and freedom of family members (mentioned by ten); (7) increasing transfer of protective functions from family to state (mentioned by ten); (8) decline of religious behavior in marriage and family (mentioned by nine).

*Id.* at n.2. All eight of those changes continued to increase through 1970 when Klemmer's book was published.

165. Hafen, *supra* note 163, at 472.

sumptions seldom go beyond platitudes and clichés.”<sup>166</sup> Professor Hafen was writing after the decision in *Trammel*; his view may well have been partially influenced by it, but still reflects a mood of the times that extends beyond a single case.

The early 1980s were days of “fully flowered egalitarianism.”<sup>167</sup> The academic journals and texts were filled with articles suggesting that the nuclear family and traditional marriage were doomed. Two classic theories were developed to explain the increasing destabilization of families in the United States. Carle C. Zimmerman theorized that family structures within advancing societies evolved according to a natural cycle, progressing from the “Trustee Family” to the “Domestic Family,” and culminating in the “Atomistic Family,” in which individual welfare and control predominated.<sup>168</sup> Zimmerman believed that the Atomistic Family’s adoption of an egocentric value system spelled the end of the host society. The theory was extended to ratify Victorian ideals as the pinnacle of social development. The theory fell from grace along with the Victorian ideals it supported.<sup>169</sup>

The second explanation is known as the structure-function theory. This theory holds that the changes in the family are natural responses to social and economic growth.<sup>170</sup> Social scientists believed they detected a worldwide movement toward adoption of nuclear family systems similar to the European pattern. They thought these changes resulted from the worldwide spread of industrialization and urbanization.<sup>171</sup> Over time, changes in the American family did not match those in the economic structure of the nation,<sup>172</sup> and the structure-function theory developed deeper problems. It simply did not fit the data.

It was seen that “primitive” societies . . . might have very complex religious and kinship systems, and that modern stone-using societies do not all have the same social systems. Moreover, since all [humans] presumably come from the same evo-

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166. *Id.*

167. *Id.* at 467.

168. KLEMER, *supra* note 163, at 21-22.

169. WILLIAM J. GOODE, *WORLD REVOLUTION AND FAMILY PATTERNS* 3 (1963).

170. KLEMER, *supra* note 163, at 21-22.

171. GOODE, *supra* note 168, at 2-26.

172. This initial discrepancy between theory and reality was explained by the “Lag Theory,” which hypothesized that the familial changes simply moved at a slower pace than economic and social changes. This “lag” seemed to explain stresses within the private institutions of civil society, which were unable to keep pace with changing conditions. It also appeared to explain why public laws aimed at reforming the civil institutions kept missing the target. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1513-20 (1983).

lutionary line and are equally distant historically from Cro-Magnon men, all societies are *equally* old.<sup>173</sup>

There was another problem. No correlation could demonstrate a connection between economic development and family structure, "although they are often assumed to be well known."<sup>174</sup>

Writing in 1970, Klemmer concluded that the American family had become "increasingly fragile in fact and possibly even more so in attitude."<sup>175</sup> Klemmer thought that the primary reason for the continuing increase in fragility of marriages was that personal "happiness . . . replaced stability as the major goal of marriage partners. Since happiness is more elusive and less easily measured than stability, it is now much easier to convince oneself that a marriage has failed."<sup>176</sup> Every long-term relationship<sup>177</sup> is bound to experience less than "happy" moments. If the goal of the marriage is individual happiness, such moments are likely to be perceived as evidence the marriage has failed. Personal unhappiness is now socially acceptable as a valid reason for divorce.

This explanation for increased divorce rates gained widespread acceptance among sociologists and psychiatrists alike. There is, however, no general agreement with Klemmer's suggestion that the expectation and pursuit of individual happiness is a mistake. Lawrence Casler is an example of someone who reached the opposite conclusion. In 1974, he wrote *Is Marriage Necessary?* Casler's answer was a resounding "No."<sup>178</sup> Casler agrees that mutual dependence of spouses is a hallmark of a stable marriage. But that does not make it a good thing.

If an individual has so few resources that happiness is impossible without someone to lean on, then he is in a state of *grave emotional impoverishment*. And the longer he uses this type of psychological crutch, the more likely he is to remain *emotionally crippled*.

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173. See *supra* note 168.

174. *Id.* at 4.

175. RICHARD H. KLEMER, *MARRIAGE AND FAMILY RELATIONSHIPS* 21 (1970).

176. *Id.* at 22. See also, KENNETH C. W. KAMMEYER, *CONFRONTING THE ISSUES: SEX ROLES, MARRIAGE, AND THE FAMILY* 11-12 (Kenneth C. W. Kammeyer ed., 1975) (Marriage "is an institution that evolved over centuries to meet some very specific needs of a nonindustrial society. Romantic love was viewed as tragic, or merely irrelevant . . . Marriage was not designed as a mechanism for providing friendship, erotic experience, romantic love, personal fulfillment, continuous lay psychotherapy or recreation. The Western European family was not designed to carry a life-long load of highly emotional romantic freight. Given its present structure it simply had to fail when asked to do so. The very idea of an irrevocable contract obligating the parties concerned to a life-time of romantic effort is utterly absurd." (quoting Mervyn Cadwalleder, *Marriage as a Wretched Institution*, 218 *ATLANTIC MONTHLY* 62 (1966))).

177. KLEMER, *supra* note 174, at 23.

178. LAWRENCE CASLER, *IS MARRIAGE NECESSARY?* 117 (1974).

. . . .  
 So much individuality must be sacrificed when one assumes the yoke of conventional matrimony that we should not be surprised to learn . . . that "the more highly developed the personality, the greater the difficulty of adjustment to marriage," nor . . . that "adjustments to the demands of marriage may greatly impair mental health . . . ." <sup>179</sup>

During the 1960s, the "Happiness" theory and the structure-function theory collided headlong with the "Age of Aquarius." The energy of the collision fused elements of both theories. This decade saw the conjunction of several gravitational masses within the United States. The postwar baby boomers reached puberty in a tidal wave of hormones and adolescent rebellion. The birth control pill became widely available. Personal gratification through drugs became acceptable, a cultural/political statement, and, ultimately, stylish. "Turn on, tune in, drop out." "Free Love." "Do your own thing." American society appeared to be changing, if not unraveling, at an unprecedented pace. Some argued that the traditional family structure was obsolete. Others went further, claiming it had become an obstacle to social progress. By the mid-1970s, these attitudes had moved from the Haight-Ashbury to the scholarly journals. Popular acceptance of the new gospel also progressed rapidly.

In 1966 sociologist Mervyn Cadwalleder wrote an article for *Atlantic Monthly* with the title "Marriage as a Wretched Institution." I have always wondered why . . . he did not come right out and say "Marriage *Is* a Wretched Institution." Perhaps that would have been too strong for the times. By 1972 Kathrin Perutz exhibited no such moderation when she published a free-swinging anti-marriage book with the title *Marriage is Hell*. With titles like this, and signs of dissatisfaction coming from several other quarters as well, it is little wonder that one of the clichés of the seventies is: "Traditional marriage is under attack." Cliché or not, the validity of the assertion can hardly be denied. <sup>180</sup>

Klemer, Cadwalleder, and Perutz were only three voices among many prophesying the end of marriage and the nuclear family, or decrying their stubborn persistence. <sup>181</sup> The point for our purposes is

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179. *Id.* at 123-24 (emphasis added) (footnote omitted). Casler's attack on marriage is based on the assumption that marriage produces a unity between spouses. This unity results from "the almost complete mutual absorption that characterizes so many marriages of the conventional . . . type . . . ." *Id.* at 124. It is an absorption that results in "[t]he total merger of the selves over the years . . . ." *Id.* Ironically, Casler finds that stable marriages are likely to produce undesirable results because of an interpersonal unity the Supreme Court discredits as a medieval legal fiction. *Trammel v. United States*, 445 U.S. 40, 44 (1980).

180. KAMMEYER, *supra* note 175 (footnotes omitted).

181. *Id.* Kammeyer provides a good sampling of the literature of the period. Kammeyer posed the question: Should the nuclear family and traditional marriage



that by the late 1970s there was widespread debate about whether the nuclear family and marriage should be preserved or actively discouraged. There is a direct link between the structure-function and "Happiness" theories and the Supreme Court's decision in *Trammel*. Both theories had found their way into the legal literature at an early date. In 1929, Robert M. Hutchins and Donald Slesinger wrote an article for the *Minnesota Law Review* entitled: *Some Observations on the Law of Evidence: Family Relations*.<sup>182</sup> They based their observations on assumptions about the role of family in England during the formative period of the law of evidence. In their view, the nuclear family existed despite the unhappiness caused. It evolved and survived only because of economic necessity.<sup>183</sup> By the twentieth century the methods of production had changed, and the family structure followed suit. The possibility of economic independence outside the home liberated women and children from the need to stay in the family.<sup>184</sup>

What we are witnessing, then, seems to be a period of social flux in which the family is changing correlatively with industrial change. There is still a strong desire for marital harmony; in fact, the divorce rate may indicate that real harmony has become the paramount issue, now that economic pressure has been removed. Another possible item of evidence for the stress on marital harmony may be the slight correlation be-

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be preserved? His book included two essays suggesting the answer is yes and two others taking the opposite view. Significantly, there are seven essays suggesting six alternatives to the absolute nuclear marriage. The author of each proposed a different alternative as a suitable substitution. The essays are: Nena O'Neill & George O'Neill, *Open Marriage* (excerpt from NENA O'NEILL & GEORGE O'NEILL, *OPEN MARRIAGE: A NEW LIFE STYLE FOR COUPLES* (1972)); Warren Mintz, *Review of Open Marriage* (reprinted from Vol. 2, No. 2 *SOCIETY* (Jan. 1974)); Jesse Bernard, *Women, Marriage, and the Future* (reprinted from *THE FUTURIST*); Bradford Klevansky, *Non-Utopian Communities—The Middle-Class Commune*; Janis Kelly, *Sister Love: An Exploration of the Need for Homosexual Experience* (reprinted from 21 *THE FAMILY COORDINATOR: J. OF EDUC., COUNSELING AND SERVICES* (Oct. 1972)); Victor Kassel, *Polygyny After 60* (reprinted from Vol. 21, No. 4 *GERIATRICS* 214-18). Kammeyer concludes that controversies about marriage and the family "have their origins in the ever present tension between social order and individual freedom. Furthermore, there is a movement toward greater individual freedom because the exigencies of life . . . are less than they once were." KAMMEYER, *supra* note 175, at 5.

See also CASLER, *supra* note 176, at 131 ("The nuclear family . . . may be, by its very nature, an inadequate locus of child-rearing. Even the best of parents is unlikely to be good enough to counteract the obstacles to growth and maturity that are embedded in this system." Further, "[f]amily-reared children probably do less well than they would if they were brought up in truly adequate institutions.").

182. 13 *MINN. L. REV.* 675 (1929).

183. "[D]isharmony was prevented by economic necessity and social pressure. It was important to keep the family together because it was a producing unit, and economic disaster might very well follow a breakup." *Id.* at 677 (footnote omitted).

184. *Id.* at 677-78.

tween low birth rate and high marriage rate. At the outset even children seem to be sacrificed to the spousal relationship.

. . . All the social and economic forces of society then are acting centrifugally, tending to break up the old family relationship. The only remaining binding ties are sexual and affectional. This realignment of forces makes a new family adjustment inevitable.<sup>185</sup>

Fifty years later, the Court cited the Hutchins and Slesinger article as an example of the sharp criticism of the marital privileges by legal scholars.<sup>186</sup>

I have noted above the *Trammel* Court's warning to itself that it should tread with care because families and marriage had already suffered "much erosion." That sentence was the Court's only overt acknowledgement that either may be worth preserving. The choice of words is interesting. Erosion is a natural, unavoidable, and irreversible process. The metaphor fits exactly with the structure-function theory of the family, as does the Court's next sentence: "At the same time, we cannot escape the reality that the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggests the need for change."<sup>187</sup>

The Court also appears to have been influenced by the "Happiness" theory. The Court's apparent acceptance of personal happiness as the prime function of marriage is implicit in the Court's argument that the social interest in preserving families and marriages should not be achieved at the risk of personal cost to the witness spouse.<sup>188</sup> I shall examine the merits of this argument below.<sup>189</sup>

Earlier I discussed the improbability that the contrast between the *Hawkins*<sup>190</sup> and *Trammel* decisions resulted from societal shifts in the sexual roles and other gender issues. It does appear, however, that the difference can be traced to a significant erosion in the perceived social value of marriage and the family during the intervening two decades.

## 2. *New Voices on the Wind*

Timing is everything. The turmoil in and about marriage and the family did not subside during the 1980s. Growing concern fueled a continuing debate. Recently, even President Clinton and former Vice President Quayle have found common ground on the need to preserve the family. Family and marriage have become national

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185. *Id.* at 678-79 (footnotes omitted).

186. *Trammel v. United States*, 445 U.S. 40, 44 n.4 (1980).

187. *Id.* at 48.

188. *Id.* at 52-53.

189. See discussion *infra* Part IV. E.

190. 358 U.S. 74 (1958).

political issues. In the decade and a half since the Supreme Court's decision in *Trammel*, a national policy on family and marriage has emerged. The broad outline of this emerging policy suggests the Court undervalued both institutions.

Nelson marked the presidential campaign of Jimmy Carter as the *entre* point of family issues as a matter of national political debate.<sup>191</sup> President Carter attempted to create a unified national policy on the family. He failed for three reasons: (1) "the resistance against new bureaucracy . . . , (2) the professional and political belief in acknowledging the 'diversity and pluralism of families' . . . , and (3) resistance to the idea of comprehensive national policy as a useful political strategy."<sup>192</sup>

Since 1980 Congress has shown an increasing willingness to intervene in family matters.<sup>193</sup> In December 1987 the President and Congress jointly established the National Commission on Children. The Commission "was to assess the status of children and families in the United States and propose new directions for policy and program development. [Its] mission was to design an action agenda for the 1990s and to build the necessary public commitment and sense of common purpose to see it implemented."<sup>194</sup>

On May 1, 1991, the National Commission on Children published its final report: *Beyond Rhetoric: A New American Agenda for Children and Families*. The Commission's final report represents a major shift in the wind last tested by the Supreme Court in *Trammel*.

[I]n recent years many policy makers and analysts—including those who traditionally approach these matters from different intellectual and political perspectives—have called for a new and more systematic approach to supporting the nation's children and families. . . . On both sides of the political aisle and in communities nationwide, the National Commission on Children has seen a growing commitment to addressing children's needs in the context of strong stable families.

Continued failure to embrace a national ethos that supports children and values their families is short-sighted, self-destructive, and morally defeating. It will impoverish this nation culturally, politically, and economically . . . . Accordingly, the Commission urges the nation to begin today . . . to rekindle a commitment to strong families and supportive communities for children.

. . . America's future is forecast in the lives of its children and the ability of their families to raise them. Most U.S. children are healthy, happy, and secure . . . .

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191. Barbara J. Nelson, *Family Politics and Policy in the United States and Western Europe*, COMP. POL., April 1985 at 351, 362.

192. *Id.* at 363 (citation omitted).

193. See THE NATIONAL COMMISSION ON CHILDREN, *supra* note 30.

194. *Id.* at viii.

But at every age, among all races and income groups, and in communities nationwide, many children are in jeopardy. They grow up in families whose lives are in turmoil. Their parents are [unable] to provide the nurturing, structure, and security that protect children and prepare them for adulthood.<sup>195</sup>

The Commission notes that most children in distress are not members of a traditional nuclear family.<sup>196</sup>

The Commission reviewed the changes in family patterns over the last three decades.<sup>197</sup> Acknowledging the absence of consensus among scholars and the public about the long-term effects of these changes, the Commission concludes there is clear evidence children “are worse off in 1990 than they were in 1970.”<sup>198</sup> “Americans from all walks of life, whether they are raising children or not, believe that something is terribly amiss with children and families.”<sup>199</sup> The Commission concludes these circumstances are likely to continue for the foreseeable future.<sup>200</sup> The Commission also noted a consensus that the root problem was the increased fragility of the family as a social institution.

The condition of children’s lives and their future prospects largely reflect the well-being of their families. When families are strong, stable, and loving, children have a sound basis for becoming caring and competent adults . . . . Many of the nation’s gravest social problems are rooted in damaged families.<sup>201</sup>

The National Commission on Children found that the “overwhelming majority” of Americans acknowledge the importance of marriage and the traditional family. Most Americans want to

195. *Id.* at 62-63 (footnote omitted).

196. *Id.* at 4 (One in four children are raised by one parent. Most of these “grow up without the consistent presence of a father . . . .” One in five lives in a family below the poverty level. Approximately 500,000 children are born each year to “teenage girls.”).

197. *Id.* Its findings included the following trends: (1) less children per family, *id.* at 16; (2) more single parent families (in 1970 approximately 12% of all households with children had a single parent in residence, by 1989 this number had risen to 25%), *id.* at 17-18; (3) an increase in real terms of the families’ income per child (due, in part, to the smaller number of children per family), *id.* at 23; (4) an increase in the number of children living below the poverty line (although the average child has economic advantages not available to her parents, [o]ne in five lives . . . below the federal poverty level. One in four . . . under the age of three is poor.”). This is especially true for children living with their mothers in single parent families, *id.* at 24; (5) a decline in the amount of time spent with children in two parent families (primarily because both parents work outside the home in more two parent homes), *id.* at 27; (6) “[child] care by adults outside their immediate family is becoming an increasingly common aspect of everyday life,” *id.*

198. *Id.* at 28.

199. *Id.* at 11.

200. *Id.* at 37.

201. *Id.* at 249.

marry. Yet one in four children born in the United States is born to an unmarried mother. As recently as 1960, the rate was only one in twenty.<sup>202</sup> The Commission argues the need for all sectors of society to "fashion responses that support and strengthen families as the once and future domain for raising children."<sup>203</sup> In the Commission's view, the federal government must take an active role.

Strong stable families are largely the product of social forces, and they are amenable to social action . . . . The nation's laws and public policies should reflect sound family values and should be aimed at strengthening and supporting families in their childrearing roles.<sup>204</sup>

The Commission coupled specific findings with articulation of policy.

*The family is and should remain society's primary institution for bringing children into the world and for supporting their growth and development throughout childhood.*

. . . .

The family is the basic social unit of our culture, and society suffers when families are weak and ineffectual. America needs a renewed commitment to the family, one that is based on recognition of the changes that have taken place in individual lives, in families, and in the communities in which they live . . . . A renewed commitment to children and families—to marriage, parenthood, and childhood—must be a reaffirmation of the ideal of the family and a commitment to family relations that best support and nurture children in a rapidly changing world.

Any effort to improve the lives and prospects of American children must support and strengthen their families.<sup>205</sup>

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202. *Id.* at 252. The increase in births to unmarried women occurred at a time when effective birth control and legal abortions were increasingly available. The Commission found a variety of explanations by scholars for the increased number of births to single women. They included: decreased economic opportunities available to the fathers, social acceptance of early and premarital sex, and a perception among poor young women of child bearing as one of the few opportunities for personal success. The Commission also noted that the welfare system and federal tax laws provided a disincentive to marry, especially to the poor. Similar disincentives were found in typical requirements of the work place. Whether resulting from divorce or birth outside of marriage, there is no dispute over the human and social costs of single parent families. These include a marked increase in the prospect that the children will experience poverty, emotional and behavioral problems, educational failures, substance abuse, mental illness, and suicide. The sons of single parent families are more vulnerable to many of the emotional and psychological risks than their sisters. The daughters in single parent families are significantly more likely to experience teenage pregnancy than are their peers in two parent families. They are, therefore, more likely to become the head of a new generation of single parent families. *Id.* at 252-54.

203. *Id.* at 37.

204. *Id.* at 249 (footnote omitted).

205. *Id.* at 68 (*italics* in original, denoting a "Principle for Action").

When next the United States Supreme Court considers marital privileges it will find the political vacuum of 1980 filled. It will hear a chorus of voices reaffirming the future of family and marriage as the warp and weft of our cultural fabric.

As America enters the 1990s, common ground for a national policy for children and families is emerging. The family is and should remain the fundamental institution for bringing children into the world and for supporting their growth and development throughout childhood. Children's well-being must be a primary focus of families, and families must be at the center of social policies and national priorities.<sup>206</sup>

#### E. Effect on Marriage Privilege

The *Trammel* Court concluded the change it was making "furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs."<sup>207</sup> Maybe. But, the Court's arguments are less than compelling. In preceding sections of this Article, I have suggested the improbability of the *Trammel* opinion resulting in significant social benefits. There is no reason to suppose federal courts have a greater need for spousal evidence today than in the past. Nor is there any reason to hope that handing law enforcement a new weapon will materially advance the war on crime. It is equally clear that there is no empirical evidence suggesting the *Trammel* decision has wrought substantial injury to the social fabric. This lack of evidence does not mean, however, that the Court was correct in concluding that the ruling would have no effect.<sup>208</sup>

The Court advances two arguments supporting the conclusion that no damage was done to marriage or family by its ruling. First, the Court suggests the change will not damage any marriage worth saving. "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

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206. *Id.* at 76.

207. *Trammel v. United States*, 445 U.S. at 53.

208. For an oft quoted argument not used by the Court in *Trammel*, see Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675 (1929). "[P]ractically no one outside the legal profession knows anything about the rules regarding privileged communications between spouses. As far as the writers are aware (though research might lead to another conclusion) marital harmony among lawyers who know about privileged communications is not vastly superior to that of other professional groups." *Id.* at 682. The argument is appealing but facetious. It is equally likely that only lawyers are aware of limitations upon the privileges. Therefore, they are incapable of enjoying the intended benefit. Both the argument and my counter are based on an assumption that lawyers conduct their personal lives in a professional manner. If this assumption were true, all lawyers would have current wills and read all contracts before signing them.

marital harmony for the privilege to preserve."<sup>209</sup> It is difficult to take this argument seriously. Prison is a fearsome prospect. Is the Court suggesting a willingness to endure years in prison rather than jeopardize a spouse as the minimum standard of "marital harmony" worth saving? If so, things are worse than even the National Commission on Children suspected. The number of marriages worth preserving must be small indeed.<sup>210</sup> Even assuming this is a valid test of marital harmony, the argument is flawed on other levels.

The privilege is based on a policy to preserve marriages.<sup>211</sup> The effect of *Trammel* is to create the forensic equivalent of a destructive testing process. At a minimum, the policy would suggest refraining from overt acts intended to destroy marriages.

The practical effect of the decision is demonstrated by the case of *United States v. Long*.<sup>212</sup> Mr. Long was a union official accused of violating the Racketeer Influenced and Corrupt Organizations Act (RICO) and assorted other offenses.<sup>213</sup> Mr. Long's wife entered into an agreement with the government in which she agreed to testify against her husband and others in exchange for personal immunity from prosecution. At trial, Mrs. Long's "brief substantive testimony related to the . . . extortion charge and the false income tax filing charges."<sup>214</sup> The jury was also informed that she had been granted immunity.<sup>215</sup>

During closing arguments, Mr. Long's lawyer reminded the jury that the government had given Mrs. Long immunity. Counsel told the jury: "[I]f she didn't testify she'd be subject to prosecution . . ." <sup>216</sup> The trial judge interrupted defense counsel and told the jury to ignore counsel's remark. The following morning, the court gave the following instruction to the jury:

During [Long's counsel's] summation he stated that Ms. Olga Long was subpoenaed. As you have heard during the trial, Olga and John Long are married and as a result of that relationship Olga Long could not and was not subpoenaed by the government at any time.

Mrs. Long could not be compelled to testify against her husband and had the absolute right to refuse to testify. Mrs. Long

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209. *Trammel v. United States*, 445 U.S. at 52.

210. Such things do happen. The Author is aware of anecdotal evidence of persons offering to plead guilty on condition that their spouse not be prosecuted. I am also aware of occasions when law enforcement used the threat of prosecuting the spouse as an inducement to obtain cooperation.

211. Even assuming the appropriateness of weighing the value of each marriage before determining whether it merits protection of the privilege, such a process must look to the marriage as it exists before the privilege is applied, not after.

212. 917 F.2d 691 (2d Cir. 1990).

213. *Id.* at 693.

214. *Id.* at 699.

215. *Id.*

216. *Id.*

chose to testify, appeared voluntarily and waived the marital privilege.<sup>217</sup>

Mr. Long was convicted. On appeal he argued that the trial court's instruction was reversible error. The Second Circuit agreed. "The instruction . . . suggested that [she] was ready and willing to testify against her husband when, *in fact, she was effectively compelled to do so to avoid prosecution . . .*"<sup>218</sup>

The Supreme Court's decision in *Trammel* sanctions government use of compulsion to shatter marriages in pursuit of convictions. The Court washed its hands of any responsibility for achieving an appropriate balance between the competing social policies. Indeed it washed all judicial hands of any involvement. The issue is now decided in the privacy of the interrogation room long before the case comes to court.

The Court's approach is not without precedent. This is not the first time courts have allowed the sovereign to test individual will. The change from trial by ordeal to trial by jury was not greeted with universal joy. Many accused continued to have greater trust in divine intervention than in a jury composed of their neighbors.

Hitherto [the defendant] has been able to invoke the judgment of God, and can we now deprive him of this ancient, this natural right? . . . No, no one can be tried by jury who does not consent to be so tried. But what we can do is this—we can compel him to give his consent, we can starve him into giving his consent, and, again, we can quicken the slow action of starvation by laying him out naked on the floor of the dungeon and heaping weights upon his chest until he says that he will abide by the verdict of his fellows. And so we are brought to the pedantic cruelty of the *peine forte et dure*.<sup>219</sup>

The conditions of imprisonment may have changed, but the threat of imprisonment remains the courts' compulsion of choice.<sup>220</sup> The inappropriateness of this approach is also apparent if we imagine it

217. *Id.*

218. *Id.* (emphasis added).

219. FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 60 (AMS Press reprint 1978) (James F. Colby ed. 1915).

220. Contrast these non-coercive attempts to *induce* testimony with those used in an attempt to *compel* John Lilburn to incriminate himself. 8 JOHN H. WIGMORE, EVIDENCE § 2250, at 282-83 (McNaughton rev. 1961). John Lilburn, "an obstreperous and forward opponent of the Stuarts" was tried for treason. *Id.* The Lilburn trial is reported at 3 How. St. Tr. 1315 (1635-47). Initially, Lilburn refused to answer any questions except those pertaining to the charge on which he had been indicted. Eventually he refused to answer any questions at all. He claimed he could not be compelled to incriminate himself. He was whipped and pilloried for his refusal. When Parliament was finally called after an eleven-year recess, John Lilburn was there on opening day with a petition for redress. Eight years and a second petition later, a bill declaring the sentence illegal passed the House of Lords and he was granted 3000 pounds as reparations. *Id.*



being applied to other privileges. For example, imagine a lawyer unfortunate enough to be caught cheating on her income tax. The government is willing to offer immunity if she will testify against her client. The trial judge permits the lawyer's testimony over the client's objection. The Supreme Court affirms, holding that permitting the lawyer to waive the privilege will further "the important public interest" in the attorney/client relationship.<sup>221</sup> The Court reasons that, if the lawyer is willing to testify against the client "—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little . . . for the privilege to preserve."<sup>222</sup>

Finally, if this process of destructive testing were an appropriate approach, we could do better by dispensing with the privilege altogether. If the marriage is worth preserving, the witness spouse will refuse to testify and endure imprisonment for contempt or commit perjury.

The Court follows this argument with a second point that is equally revealing.

[A] rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace. It is argued that abolishing the privilege will permit the Government to come between husband and wife, pitting one against the other. That, too, misses the mark. Neither *Hawkins*, nor any other privilege, prevents the Government from enlisting one spouse to give information concerning the other or to aid in the other's apprehension. It is only the spouse's testimony in the courtroom that is prohibited.

Indeed, there is reason to believe that vesting the privilege in the accused could actually undermine the marital relationship. For example, in a case such as this, the Government is unlikely to offer a wife immunity and lenient treatment if it knows that her husband can prevent her from giving adverse testimony.<sup>223</sup>

The footnote suggests that the privilege is ineffective because the Government will exploit its power to pit one spouse against the other simply for information even if it cannot use one spouse as a witness against the other. The next sentence in the text suggests the opposite—that the government will *not* use its power unless it can call the spouse as a witness. In fact both are true. Ordinarily the prosecution will offer immunity merely for information only in the exceptional case. Such an offer is likely only if the crime of one spouse is less heinous than that of the other and the perceived need for information is great. Ironically, this circumstance is tantamount

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221. *Trammel v. United States*, 445 U.S. at 53.

222. *Id.* at 52.

223. *Id.* at 52-53.

to a pragmatic mechanism for ensuring that the government would attempt to compel cooperation only in cases of extreme need.

The Court concluded that the effect of the common law privilege was to permit one spouse "to escape justice at the expense of the other."<sup>224</sup> This is undeniably true but hardly a distinguishing criterion. After all, escaping justice is exactly what the government persuaded Mrs. Trammel to do, at considerable expense to Mr. Trammel.

I have discussed both of the arguments advanced by the Court justifying its conclusion that the change imposed by the *Trammel* decision "furthers the important public interest in marital harmony."<sup>225</sup> Both arguments focus on the viability of the particular marriage and balance it against law enforcement's generic need for evidence.<sup>226</sup> At a minimum, if the focus is upon the particular marriage, why not also inquire into the need for the particular evidence that the spouse might provide? This is a false trail. The purpose of evidentiary privileges is not to test the relative merit of individual relationships. The purpose of the Spouses' Testimonial Privilege, like all privileges, is to strike a societal balance. Evidentiary privileges are not rules of forensic minutiae. They are not intended to determine if this person is guilty or if that marriage is worth preserving. Privileges are the broad societal limitations upon the judicial process.

## V. CONCLUSION

There are some conclusions we can reach with a fair degree of certainty about the Supreme Court's decision in *Trammel v. United States*.<sup>227</sup> First, undoubtedly a few defendants were convicted who would otherwise have been acquitted during the last fifteen years. Second, a few marriages have been destroyed that might otherwise have survived. It is equally certain both will continue to happen from time to time in the future.

Unfortunately, we run past the limits of our certainty before we reach the important questions. The outcome of a single case or survival of a particular marriage are not what the evidentiary privilege is about. The Spouses' Testimonial Privilege is about the importance of family and marriage. It is about the need for evidence and limits upon the societal costs of obtaining evidence. It is about the need for privacy, trust, and loyalty. It is about governmental power to compel individuals to do what they otherwise would not.

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224. *Id.* at 53.

225. *Id.*

226. Steven N. Gofman, "Honey, The Judge Says We're History": Abrogating the Marital Privileges Via Modern Doctrines of Marital Worthiness, 77 CORNELL L. REV. 843, 860-65 (1992).

227. 445 U.S. 40 (1980).

Fifteen years ago the *Trammel* Court decided that the societal interest in assisting law enforcement was more important than preserving marriage from further erosion. Today, there are voices suggesting a different conclusion.

[A] growing body of research suggests there are several identifiable characteristics of strong families. Among the most important of these is clear, open, and frequent communication among family members.<sup>228</sup> Similarly, strong families cultivate a sense of belonging to a warm, cohesive social unit, while at the same time nurturing the development of individual strengths and interests. In successful families, members provide one another mutual support, recognition, and respect, and they are willing to make sacrifices if necessary to preserve the well-being of the family.<sup>229</sup>

Will it matter to our great-grandchildren that Mr. Trammel went to prison and Mrs. Trammel did not? Undoubtedly not. But, it might matter that the United States Supreme Court felt that convictions were more important than marriages.

It does matter where we choose to look for our future. Where we choose to place the wager of our hope matters a great deal. Do we bet on the squad room, the courtroom, or our living room? Which we choose has more to do with who we are and who we shall become, than anything we shall ever win or lose on the wager itself.

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228. See THE NATIONAL COMMISSION ON CHILDREN, *supra* note 30, at 254; NICK STINNETT & JOHN DEFRAIN, *SECRETS OF STRONG FAMILIES* 14 (1985). See also JERRY M. LEWIS, *HOW'S YOUR FAMILY? A GUIDE TO IDENTIFYING YOUR FAMILY'S STRENGTHS AND WEAKNESSES* (1979); N.B. Epstein et al., *The McMaster Family Assessment Device*, *J. OF MARITAL & FAM. THERAPY* 9, 171-80 (1983); *The Diversity and Strength of American Families: Hearing Before the Select Committee on Children, Youth, and Families of the House of Representatives*, 99th Cong., 2d Sess. 100-06 (1986) (statement of David Olson).

229. *Id.* at 44-50 (statement of Nick Stinnett).