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State v. Briley: Judicial Extension of the Statutory Exceptions to the Husband-Wife Testimonial Privilege in Criminal Actions for Offenses Committed by One Spouse against a Third Person

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STATE v. BRILEY: JUDICIAL EXTENSION OF THE STATUTORY EXCEPTIONS TO THE HUSBAND-WIFE TESTIMONIAL PRIVILEGE IN CRIMINAL ACTIONS FOR OFFENSES COMMITTED BY ONE SPOUSE AGAINST A THIRD PERSON

The Supreme Court of New Jersey in *State v. Briley*[1] recently held that the wife of an accused man can testify against him as to a crime committed by him against a third person, when such crime occurs within the same transaction as an act of criminal violence committed by the accused upon the person of the wife. This decision raises the question of whether such a ruling is an over-extension of the exceptions to the rule of husband-wife incompetency, as presently applicable in the state of New Jersey.[2]

This Note will survey the present status of the rules pertaining to the competency of one spouse to testify against the other in criminal proceedings in the state and federal courts and analyze the different interpretations which state courts have given to statutes similar to that of New Jersey. It will then assess the holding of the *Briley* case in light of both the current trends in the area of law involved and the tenets of statutory interpretation.

FACTS OF STATE V. BRILEY

In *State v. Briley* the defendant was accused of the atrocious assault and battery of his wife and the homicide of a third party, Reaves. After an argument between the defendant and his wife concerning her relationship with Reaves, she left home with the defendant's and her child and obtained temporary lodging at a nearby motel. After searching three days, the defendant found his wife and Reaves in the latter's automobile. He approached the vehicle carrying a shotgun, and Reaves opened the car door to meet him. In the ensuing struggle the shotgun was discharged and Reaves

1. 53 N.J. 498, 251 A.2d 442 (1969).

2. The case was decided in light of Rule 23(2) of the New Jersey Rules of Evidence; N.J. STAT. ANN. § 2A:84A-17(2) (1968), which provides:

> (2) The spouse of the accused in a criminal action shall not testify in such action except to prove the fact of marriage unless (a) such spouse and the accused shall both consent or (b) the accused is charged with an offense against the spouse, a child of the accused or of the spouse or a child to whom the accused or the spouse stands in the place of a parent or (c) such spouse is the complainant.

was killed. The defendant's wife then left her baby on the seat of the car and fled on foot. She ran several feet, tripped and fell, whereupon the defendant hit her several times with the butt of the shotgun.

Counts of atrocious assault and battery and homicide were joined in the same indictment. The defendant made a pre-trial motion to have the counts severed, but it was denied. During the trial the defendant's wife was produced as a witness for the prosecution, at which time the pre-trial motion to sever was renewed and again denied. The defendant then moved to have his wife's testimony limited to the charge of atrocious assault and battery committed upon her and excluded with respect to the murder. This motion was also denied. The trial resulted in a conviction for both manslaughter and atrocious assault and battery.

On appeal the Supreme Court of New Jersey held that it was within the trial court's discretion to join in the same indictment the two distinct crimes which arose out of the same transaction and that, in this particular case, it was not an abuse of the court's discretion to do so. The supreme court believed that the wife would have been allowed to testify against the defendant as to the murder charge regardless of whether the two counts were severed and tried separately or were tried together. The important issue presented was whether the wife's testimony concerning the killing of Reaves should have been admitted.

BACKGROUND

A. *The Husband-Wife Privilege and its Rationale*

At common law[3] a husband or wife was incompetent to testify in any proceeding in which the other was involved.[4] The reason for the rule was that the husband and wife were considered one person.[5] Today, there are presented three basic reasons why neither the husband nor the wife may be a competent witness for or against the other:[6] (1) allowing one spouse to testify against

3. *Cf.* Commonwealth v. Allen, 191 Ky. 624, 626, 231 S.W. 41, 42 (1921) (the court states that the antiquity of the rule is so great that its origin is undiscoverable).

4. *See* Dill v. People, 19 Colo. 469, 36 P. 229 (1894); Commonwealth v. Spencer, 212 Mass. 438, 99 N.E. 266 (1912); State v. Kodat, 158 Mo. 125, 59 S.W. 73 (1900); Heckman v. Heckman, 215 Pa. 203, 64 A. 425 (1906).

5. L. COKE, COMMENTARY UPON LITTLETON, 6b (1628): ". . . [a] wife cannot be produced either for or against her husband 'quia sunt duae animae in carne una' (For they are two souls in one flesh)." *Id.*; 2 L.C.J. HALE, THE HISTORY OF THE PLEAS OF THE CROWN, 279 (Emlyn Ed. 1736): "[man and wife] are disabled in respect of the civil unity of their persons."

6. Cargill v. State, 25 Okla. Crim. Rep. 314, 316, 220 P. 64, 65 (1923). *See generally* 8 J. WIGMORE, EVIDENCE § 2228 (McNaughten rev. 1961). In this section Professor Wigmore presents the leading arguments for preserving the privilege and also the reasoning of those who criticize the rule and its policy. Wigmore agrees with the latter, stating:

the other would lead to disruption and destruction of the family relationship;[7] (2) because of pre-existing domestic disharmony, one spouse may be the instrument of the other's condemnation;[8] and (3) allowing one spouse to testify at the trial of the other could lead to perjury by one spouse in defending or condemning the other.[9]

An exception to the general rule of incompetency developed at early common law. Under the exception a wife was allowed to testify against her husband concerning an act of physical violence committed by the husband upon the person of the wife.[10] This exception was created by necessity, partly for the protection of the wife in her life and liberty and partly for the sake of public justice.[11]

B. *Present Statutory Enactments*

1. *Abrogation of the common law rule*

Today, the admissibility of testimony by the spouse of the accused in criminal cases is controlled by statutes in every state.[12]

No one of these supposed reasons was ever logically carried out in the inforcing of the rule; no one of them represented adequate cause for its existence, and no one of them, in all probability, reproduced the motives or sentiments which actually served for the original acceptance of the rule in the 1500's.

Id. at 213-14.

7. 8 J. WIGMORE, EVIDENCE § 2228 (McNaughten rev. 1961).

8. Knowles v. People, 15 Mich. 408, 413 (1867); Mills v. United States, 1 Pinney 73, 74-75 (Wis. 1839).

9. Davis v. Dinwoody, 4 Term. R. 678, 679, 100 Eng. Rep. 1241 (K.B. 1792).

10. Lord Audley's Trial, 3 How. St. Tr. 401, 402, 404 (1631).

11. People v. Zabijak, 285 Mich. 164, 280 N.W. 149 (1938); State v. Kollenborn, 304 S.W.2d 855 (Mo. 1957). *But see* Bentley v. Cook, 3 Doug. 422, 424 (1784) (Lord Mansfield suggests that the necessity of the exception is one particularly for the protection of the wife).

12. ALA. CODE tit. 15, § 311 (1958); ALASKA RULES OF CRIM. PROC., 26(b)(2) (Supp. Sept. 1966); ARIZ. REV. STAT. ANN. § 13-1802 (1956); ARK. STAT. ANN. § 43-2020 (1947); CAL. EVID. CODE §§ 970, 972 (West 1966); COLO. REV. STAT. ANN. § 154-1-7 (1963); CONN. GEN. STAT. ANN. § 54-84 (1958); DEL. CODE ANN. tit. 11, § 3502 (1953); D.C. CODE ANN. § 14.306 (1961); FLA. STAT. ANN. §§ 90.04, 932.31 (1960); GA. CODE ANN. § 38-160-1 (Supp. 1968); HAWAII REV. LAWS §§ 621-18, -19 (1955); IDAHO CODE ANN. § 19-3002 (1947); § 9-203(1) (Supp. 1969); ILL. ANN. STAT. ch. 38, § 155-1 (Smith-Hurd 1964); INDIANA ANN. STAT. §§ 2-1713, -1714 (1968); IOWA CODE § 622.7 (1966); KAN. STAT. ANN. § 62-1420 (1964); KY. REV. STAT. ANN. § 421.210 (1963); LA. REV. STAT. ANN. § 15.461 (1950); ME. REV. STAT. ANN. tit. 15, § 1315 (1964); MD. ANN. CODE art. 35, § 4 (Supp. 1968); MASS. GEN. LAWS ANN. ch. 233, § 20 (1959); MICH. COMP. LAWS § 600.2162 (1948); MINN. STAT. ANN. § 595.02 (Supp. 1969); MISS. CODE ANN. § 1689 (1957); MO. ANN. STAT. § 546.260 (1949); MONT. REV. CODES ANN. § 94-8802 (1947); NEB. REV. STAT. § 25-1203 (1964); NEV. REV. STAT. § 48.040

These statutes have developed in a variety of forms. Legislatures in twenty-two jurisdictions have passed statutes which have the effect of making the husband or wife of an accused person competent to testify for or against his spouse in all criminal actions.[13] Some statutes provide that the spouse of the accused shall be considered as any other witness, that is, both competent and compellable to give testimony.[14] However, these jurisdictions continue to recognize the privilege of keeping marital communications confidential.[15] Some statutes make the spouse incompetent to disclose marital communications,[16] while others provide that he or she cannot be compelled to disclose them.[17] A few jurisdictions provide that even the marital communication privilege is lost in prosecutions of one spouse for criminal violence against the other, child abuse, bigamy, adultery or desertion.[18]

(1967); N.H. REV. STAT. ANN. § 516.27 (1955); N.J. STAT. ANN. § 2A:84A-17 (2) (1968); N.M. STAT. ANN. § 40A-1-12 (1953); N.Y. CIV. PRAC. LAW §§ 4502, 4512 (McKinney 1963); N.C. GEN. STAT. § 8.57 (Supp. 1967); N.D. CENT. CODE § 31-01-02 (1960); OHIO REV. CODE ANN. § 2945.42 (Baldwin 1964); OKLA. STAT. ANN. tit. 22, § 702 (1969); ORE. REV. STAT. § 139.320 (1965); PA. STAT. ANN. tit. 19, § 683 (1936); R.I. GEN. LAWS ANN. § 12-17-10 (1956); S.C. CODE ANN. § 26-403 (1962); S.D. CODE § 36.0101 (1939); TENN. CODE ANN. § 40.2404 (1955); TEX. CODE CRIM. PROC. art. 38.11 (1966); UTAH CODE ANN. § 77-44-4 (1953); VT. STAT. ANN. tit. 12, § 1605 (1959); VA. CODE ANN. § 8-288 (1957); WASH. REV. CODE ANN. § 5.60.060 (Supp. 1968); W. VA. CODE ANN. § 57-3-3 (1966); WIS. STAT. ANN. § 325.18 (1958); WYO. STAT. ANN. § 1-142 (Supp. 1969).

13. ALA. CODE tit. 15, § 311 (1958); CAL. EVID. CODE §§ 970, 972 (West. 1966); CONN. GEN. STAT. ANN. § 54-84 (1958); DEL. CODE ANN. tit. 11, § 3502 (1953); D.C. CODE ANN. § 14.306 (1961); FLA. STAT. ANN. §§ 90.04, 932.31 (1961); GA. CODE ANN. § 38-1604 (Supp. 1968); ILL. ANN. STAT. ch. 38, § 155-1 (Smith-Hurd 1964); IND. ANN. STAT. §§ 2-1713, -1714 (1968); KAN. STAT. ANN. § 62-1420 (1964); KY. REV. STAT. ANN. § 421.210 (1963); LA. REV. STAT. § 15.461 (1950); ME. REV. STAT. ANN. tit. 15, § 1315 (1964); MD. ANN. CODE art. 35, § 4 (Supp. 1968); MASS. GEN. LAWS ANN. ch. 233, § 20 (1959); N.H. REV. STAT. ANN. § 516.27 (1955); N.Y. CIV. PRAC. LAW §§ 4502, 4512 (McKinney 1963); R.I. GEN. LAWS ANN. § 12-17-10 (1956); S.C. CODE ANN. § 26-403 (1962); TENN. CODE ANN. § 40.2404 (1955); VT. STAT. ANN. tit. 12 § 1605 (1959); WIS. STAT. ANN. § 325.18 (1958).

14. FLA. STAT. ANN. §§ 90.04, 932.31 (1960); N.Y. CIV. PRAC. LAW §§ 4502, 4512 (McKinney 1963); S.C. CODE ANN. § 26-403 (1962) *cf.* CAL. EVID. CODE §§ 970, 972 (West. 1966); CONN. GEN. STAT. ANN. § 54-84 (1958); MD. ANN. CODE art. 35 § 4 (Supp. 1968) (providing that the spouse of the accused may be compelled to testify concerning crimes committed one against the other or against a child of either).

15. *See, e.g.*, VT. STAT. ANN. tit. 12, § 1605 (1959), providing:

> [N]either [husband nor wife] shall be allowed to testify against the other as to a statement, conversation, letter or other communication made to the other or to another person nor shall either be allowed in any case to testify as to a matter which in the opinion of the court, would lead to a violation of marital confidence.

16. GA. CODE ANN. § 38-418(1) (Supp. 1968); IND. ANN. STAT. § 2-1714 (1968); KY. REV. STAT. ANN. § 421.210 (1963); LA. REV. STAT. § 15.461 (1950); MD. ANN. CODE art. 35, § 4 (Supp. 1968); N.H. REV. STAT. ANN. § 516.27 (1955); N.Y. CIV. PRAC. LAW § 4502 (McKinney 1963); TENN. CODE ANN. § 40.2404 (1955).

17. ALA. CODE tit. 15, § 311 (1958); DEL. CODE ANN. tit. 11, § 3502 (1953); FLA. STAT. ANN. §§ 90.04, 932.31 (1960); S.C. CODE ANN. § 26-403 (1962).

18. CAL. EVID. CODE §§ 980-987 (West 1966); CONN. GEN. STAT. ANN.

2. *Retention of the rule*

The majority of state jurisdictions are controlled by statutes which retain the common law incompetency rule, including the early exception,[19] in some modified form.[20] The nucleus of this type of statute is a restatement of the common law rule which provides:

> A husband shall not be examined for or against his wife, without her consent, nor a wife for or against her husband without his consent . . . but this rule does not apply to a criminal action or proceeding for a crime committed by one against the other.[21]

To this basic statutory provision, legislative enactments have added a variety of exceptions, the extent of which varies from jurisdiction to jurisdiction. Depending upon the jurisdiction, one spouse may be competent to testify against the other in prosecutions for (1) incest, rape, adultery or bigamy;[22] (2) crimes against children of either or both spouses;[23] or (3) desertion or failure to

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§ 54-84 (1958); D.C. CODE ANN. § 14-306 (1961); ILL. ANN. STAT. ch. 38, § 155-1 (Smith-Hurd 1964); KAN. STAT. ANN. § 62-1420 (1964); MASS. GEN. LAWS ANN. ch. 233, § 20 (1959); VT. STAT. ANN. tit. 12, § 1605 (1959); WIS. STAT. ANN. § 325.18 (1958); *cf.* ME. REV. STAT. ANN. tit. 15, § 1315 (1964); R.I. GEN. LAWS ANN. § 9-17-13 (1956) (providing that the privilege to exclude marital communications is lost in all criminal actions).

19. *See* note 10 and accompanying text *supra.*

20. ALASKA R. CRIM. P., 26(b)(2) (Supp. Sept. 1966); ARIZ. REV. STAT. ANN. § 13-1802 (1956); ARK. STAT. ANN. § 43.2020 (1948); COLO. REV. STAT. ANN. § 154-1-7 (1963); HAWAII REV. LAWS § 621-18 (1955); IDAHO CODE ANN. § 9-203(1) (Supp. 1969), § 19-3002 (1947); IOWA CODE §§ 622.7, 622.8 (1966); MICH. COMP. LAWS § 600.2162 (1948); MINN. STAT. ANN. § 595.02 (Supp. 1969); MISS. CODE ANN. § 1689 (1957); MO. ANN. STAT. § 546.260 (1953); MONT. REV. CODES ANN. § 94-8802 (1947); NEB. REV. STAT. § 25.1203 (1964); NEV. REV. STAT. § 48.040 (1947); N.J. STAT. ANN. § 2A:84A-17(2) (1968); N.M. STAT. ANN. § 40A-1-12 (1953); N.C. GEN. STAT. § 8-57 (Supp. 1967); N.D. CENT. CODE § 31-01-02 (1960); OHIO REV. CODE ANN. § 2945.42 (Baldwin 1964); OKLA. STAT. ANN. tit. 22, § 702 (1969); ORE. REV. STAT. § 139.320 (1965); PA. STAT. ANN. tit. 19, § 683 (1936); S.D. CODE § 36.0101 (1939); TEX. CODE CRIM. PROC. art. 38.11 (1966); UTAH CODE ANN. § 77-44-4 (1953); VA. CODE ANN. § 8.288 (1957); WASH. REV. CODE ANN. § 5.60.060 (Supp. 1968); W. VA. CODE ANN. § 57-3-3 (1966); WYO. STAT. ANN. § 1-142 (Supp. 1969).

21. *E.g.*, ALASKA R. CRIM. PROC., 26(b)(2) (Supp. Sept. 1966).

22. *See* ARIZ. REV. STAT. ANN. § 13-1802 (1956); MICH. COMP. LAWS § 600.2162 (1948); NEB. REVISED STATUTES § 25-1203 (1964); N.C. GEN. STAT. § 8-57 (Supp. 1967); N.M. STAT. ANN. § 40A-1-12 (1953); OHIO REV. CODE ANN. § 2945.42 (Baldwin 1964); WYO. STAT. ANN. § 1-142 (Supp. 1969).

23. IDAHO CODE ANN. § 9-203(1) (Supp. 1969); MICH. COMP. LAWS § 600.2162 (1948); MO. ANN. STAT. § 546.260 (1953); MONT. REV. CODES ANN. § 94-8802 (1947); N.J. STAT. ANN. § 2A:84A-17(2) (1968); N.M. STAT. ANN. § 40A-1-12 (1953); OHIO REV. CODE ANN. § 2945.42 (Baldwin

support one's wife and children.[24]

THE CURRENT TREND TOWARD COMPETENCY

In *State v. Briley*[25] the court stated that it is the basic policy of the law, including the New Jersey rules of evidence,[26] that every person is qualified and compellable to be a witness and to give relevant and competent evidence at a trial.[27] The privilege, given the accused under New Jersey Rule 23(2)[28] to exclude the adverse testimony of his spouse, was considered by the court to be "an obstacle in the path of the normal trial objective of a search for ultimate truth."[29] Thus, the court believed that the privilege should be accepted only in those situations in which a more important public interest is served by asserting the privilege than by allowing full disclosure.[30] When greater public interest is served by recognizing the competency of one spouse to testify against the other and no violence is done to the privilege as expressed in a statutory rule of evidence, it was held that the testimony should be received.[31] In construing Rule 23(2), the court stated:

> Sensibly construed this language does not restrict the testimony of a wife against a husband to the particular criminal action in which she alone is the victim of his crime. If there is a single criminal event in which she and others are targets or victims of the husband's criminal conduct in the totality of the integrated incident and formal charges are made against the husband for some or all the offenses committed (one of which charges is for an offense against the spouse) the wife should be a competent and

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1964); OKLA. STAT. ANN. tit. 22, § 702 (1969); ORE. REV. STAT. § 139.320 (1965); PA. STAT. ANN. tit. 19, § 683 (1936); TEX. CODE CRIM. PROC. art. 38.11 (1966); VA. CODE ANN. § 8-288 (1957); WASH. REV. CODE ANN. § 5.60.060 (Supp. 1968); W. VA. CODE ANN. § 57-3-3 (1966).

24. ARIZ. REV. STAT. ANN. § 13-1802 (1956); IDAHO CODE ANN. § 19-3002 (1947); IOWA CODE § 622.7 (1966); MICH. COMP. LAWS § 600.2162 (1948); MINN. STAT. ANN. § 595.02 (Supp. 1969); MISS. CODE ANN. § 1689 (1957); MONT. REV. CODES ANN. § 94-8802 (1947); NEB. REV. STAT. § 25-1203 (1964); N.M. STAT. ANN. § 40A-1-12 (1953); N.C. GEN. STAT. § 8.57 (Supp. 1967); N.D. CENT. CODE § 31-01-02 (1960); OHIO REV. CODE ANN. tit. 22, § 702 (Baldwin 1969); TEX. CODE CRIM. PROC. art. 38.11 (1966); UTAH CODE ANN. § 77-44-4 (1953).

25. 53 N.J. 498, 251 A.2d 442 (1969).

26. The court refers to N.J. R. OF EVIDENCE 7, N.J. STAT. ANN. § 2A:84A-16 (1968); which provides:

> Except as otherwise provided in these rules or by other law of this state, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness and (c) no person has a privilege to refuse to disclose any matter or to produce any object or writing and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing and (f) all relevant evidence is admissible.

27. 53 N.J. 498, 506, 251 A.2d 442, 446 (1969).

28. Cited and quoted in note 2 *supra*.

29. 53 N.J. 498, 506, 251 A.2d 442, 446 (1969).

30. *Id.*

31. *Id.*

> compellable witness against her husband at the trial of all the cases regardless of whether they are tried separately or in one proceeding.[32]

It is apparent, therefore, that *Briley* presents a liberal view as to situations in which the husband-wife privilege can be disregarded. In this respect the reasoning of the *Briley* court is analogous to that of the federal courts presented in a series of decisions beginning with *Funk v. United States*,[33] in which the United States Supreme Court held that the wife of the accused could testify on his behalf in a prosecution under the National Prohibition Act.[34] Previously, the federal courts had held that neither the husband nor the wife could testify for or against the other, except as to personal violence committed by one spouse upon the other.[35] The *Funk* Court asserted that since the legislature had not acted, the federal courts could decide the issue of competency in accordance with present day standards of wisdom and justice rather than in accordance with "time worn" rules of the common law.[36] The case led to the enactment of Rule 26 of the Federal Rules of Criminal Procedure[37] which provides:

> The admissibility of evidence and the competency and privileges of witnesses shall be governed; except when an act of Congress or these rules otherwise provide, by the principals of the common law as they may be interpreted by the courts of the United States in light of *reason* and *experience*.[38]

Presently Rule 26 is the only statutory modification which governs the federal courts in their interpretation of the common law rule.

Even under the broad guidelines of Rule 26, however, the Supreme Court has hesitated to completely abrogate the common

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32. *Id.*
33. 209 U.S. 371 (1933).
34. Act of Oct. 28, 1919, ch. 85, 41 Stat. 305; Act of Nov. 23, 1921, ch. 134, 42 Stat. 222 (*repealed* by Act of Aug. 27, 1935, ch. 740, 49 Stat. 873).
35. *See* Stein v. Bowman, 38 U.S. (13 Pet.) 209 (1839).
36. 209 U.S. at 381-82.
37. FED. R. CRIM. P. 26.
38. Emphasis added. The tenth circuit combined the holding of the *Funk* case with the language of FED. R. CRIM. P. 26 to abolish the husband-wife privilege. In Thouvenell v. Zerbst, 83 F.2d 1003 (10th Cir. 1936); and Yoder v. United States, 80 F.2d 665 (10th Cir. 1935), that court recognized a clear trend toward removing incompetency and held that only confidential communications could be excluded. *But see*, Brunner v. United States, 168 F.2d 281 (6th Cir. 1948); Paul v. United States, 79 F.2d 561 (3d Cir. 1935). Both cases held that the spouse of the accused was still incompetent to testify against him. The tenth circuit's holdings were finally overruled by the United States Supreme Court in Hawkins v. United States, 358 U.S. 74 (1958).

law privilege. In *Hawkins v. United States*[39] the Court held that it was prejudical error to allow a wife to testify against her husband, over his objection, in a prosecution for violation of the Mann Act,[40] when the wife was not a victim. Although recognizing that the Supreme Court or Congress can change or modify the common law where circumstances or experience dictate,[41] the Court reasoned that the rule is necessary to foster family peace, not only to the benefit of the husband, wife and children, but to the public as well.[42]

Further hesitancy to completely abrogate the common law rule can be inferred from the majority opinion in the case of *Wyatt v. United States*[43] which held that the wife of the accused, who was the victim of her husband's Mann Act violation,[44] could be compelled to testify against him. Because the wife was the victim of her husband's crime, the exception to the privilege rendered her a competent witness against him. However, the mere fact that the privilege to exclude testimony was lost to the accused, did not mean that the corresponding privilege not to testify was ipso facto lost to the witness.[45] Rather than laying down a general rule that both privileges stand or fall together, the Court looked to the particular situation presented. It based its decision upon a supposition implied in the Mann Act that the function of the act is to protect women of such weak minds that they are deemed to have no independent will of their own. Such weak minded women, therefore, are not considered capable of making the decision as to whether or not they wish to testify against their spouse.[46]

The dissenting opinion in the *Wyatt* case, written by Mr. Chief Justice Warren, and Mr. Justices Black and Douglas, stated that even this narrow holding was an over-extension of the rule. To the dissenting justices, such a holding amounted to judicial legislation.[47] They felt that congressional action was needed to abrogate the common law rule, stating:

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39. 358 U.S. 74 (1958).
40. 18 U.S.C. § 2421 (1959).
41. Congress or the Supreme Court is given this power in 18 U.S.C. § 3771 (1959).
42. 358 U.S. at 77. But Mr. Justice Stewart in the concurring opinion expressed doubt as to the necessity of the privilege:

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

Id. at 81-82 (concurring opinion).
43. 362 U.S. 525 (1960).
44. 18 U.S.C. § 2421 (1959).
45. 362 U.S. at 529.
46. *Id.* at 530.
47. *Id.* at 534 (dissenting opinion).

> Federal Rule of Criminal Procedure 26 must be exercised with awareness of the distinction between matters which fall within the special competency of the judiciary and those which are primarily the concern of the legislation. Criticism of the common law rule contains value judgments which the legislature is far better adapted to accept or reject than is the judiciary.[48]

GENERAL RULE REGARDING THE SPOUSES INCOMPETENCY AS TO CRIMES COMMITTED BY THE ACCUSED AGAINST THIRD PERSONS

Decisions dealing with an issue concerning the husband-wife privilege, similar to that presented in *State v. Briley*[49] are few.[50] In *State v. Woodrow*[51] the defendant was convicted of the murder of his fourteen month old child, who was in the arms of the defendant's wife when shot, the bullet passing through the child and into his wife. On appeal, the West Virginia Supreme Court held that prejudicial error occurred when the trial court allowed the wife to testify against her husband at the trial for the murder of the child. The decision was based on the common law exception which was limited to prosecutions for violence committed directly upon the testifying spouse.[52] Although there was but one bullet fired, the court decided that two distinct crimes occurred; shooting the child could not be considered personal violence against the spouse.[53]

The same result was reached in Georgia in *Grier v. State*.[54] The defendant shot at his wife with the intention of killing her. The bullet missed its target and killed her child. At the murder trial the defendant's wife was allowed to testify under a statute which provided that the spouse of the accused was incompetent to testify except in the case of a crime committed upon his or her person.[55] The Supreme Court of Georgia held that since the defendant

48. *Id.* at 535 (dissenting opinion).
49. 53 N.J. 498, 251 A.2d 442 (1969).
50. The only case cited by the New Jersey court which, under a similar fact situation, allowed the wife to testify against her husband concerning a crime upon a third person is People v. Pillitto, 116 Cal. App. 2d 373, 253 P.2d 705 (1953) (decided under CAL. CIV. PRO. CODE § 1881(1) (West 1954) (repealed 1965). This statute provided that the general disqualification of one spouse as a witness against the other has no application in a criminal action for a crime committed against another person by such spouse while engaged in committing a crime against the other spouse.
51. 58 W. Va. 527, 52 S.E. 545 (1905).
52. *See* note 10 and accompanying text *supra*.
53. 58 W. Va. 527, 529, 52 S.E. 545, 546 (1905).
54. 158 Ga. 321, 123 S.E. 210 (1924).
55. No. 1880-1 (1866) Ga. Acts 139. Statutes subsequently enacted in both Georgia and West Virginia have changed these holdings. *See* GA. CODE ANN. § 38-1604 (Supp. 1968); W. VA. CODE ANN. § 57-3-3 (1966).

was being tried for the murder of the child and not attempted murder of the wife, it was prejudicial to allow her to testify against him.[56]

The Supreme Court of Nebraska, however, reached a different result in *Miller v. State*.[57] The court held that it was proper for the wife of the accused to state all the facts relating to the commission of the crime committed against her notwithstanding that her evidence may tend to convict him of another and different crime committed at the same time and in the same transaction.[58] In *Miller* the defendant had entered the house of his wife's parents and there shot his wife, her mother and her father. Three counts of felonious assault were joined in the same indictment and tried together. At the trial the defendant's wife was allowed to testify as to each shooting. The jury found the defendant guilty only of the charge of shooting his wife.

Ordinarily, in cases of felony where two or more distinct crimes are contained in the same indictment, either the indictment would be quashed or the prosecutor compelled to elect upon which charge he will rely for conviction.[59] On appeal, however, the court held that there was no abuse of discretion in refusing to make the prosecutor elect in this case since the defendant was acquitted of all of the charges except the one accusing him of shooting his wife.[60] Furthermore, the court believed that there was sufficient evidence to sustain the verdict.[61] The case was decided under a statute[62] which allowed the wife to testify as to a crime committed against her. The court considered the shot fired at her so closely related to those fired at her mother and father as to be part of the res gestae.[63]

The above case, cited in *State v. Briley*, held that the testimony of the wife was admissible as to the whole transaction. However, the *Miller* case did not hold that the accused's wife would be a competent witness against her husband if the counts pertaining to the crimes against the third persons had been severed and tried at

56. Both State v. Woodrow, 58 W. Va. 527, 52 S.E. 545 (1905); and Grier v. State, 158 Ga. 321, 123 S.E. 210 (1924) contain dissenting opinions. The dissent in *Woodrow* criticized that case's decision as being too narrow. 58 W. Va. at 536, 52 S.E. at 551 (dissenting opinion). The dissenting justices in *Grier* found it difficult to distinguish between the crime committed against the testifying spouse and that committed against the child. 158 Ga. at 330, 123 S.E. at 216 (dissenting opinion).

57. 78 Neb. 645, 111 N.W. 637 (1907).

58. *Id.* at 645, 111 N.W. at 637.

59. *Id.* at 648, 111 N.W. at 638.

60. *Id.* at 647, 111 N.W. at 637-38.

61. *Id.* at 648, 111 N.W. at 638.

62. Acts of 1905, ch. 172, § 1, Neb. Laws 655 (now NEB. REV. STATS. § 25-1203 (1964)).

63. 1 J. WIGMORE, EVIDENCE § 213 (3rd ed. 1940). The evidentiary rule provides that other misconduct of a defendant may be receivable as "necessary parts of the proof of the entire deed or concomitant parts of the criminal act or inseparable elements of the deed." *Id.* at 722.

separate proceedings. The *Miller* case was decided upon the evidentiary rule of res gestae.[64] The res gestae embraces, in addition to the actual facts of the transaction and the circumstances surrounding it, matters immediately preceding and having a direct causal connection with it and acts immediately following the transaction so closely connected with it as to form a part of the occurrence.[65] Applying this rule to the *Briley* case would allow the wife to testify as to the crime committed by her husband against a third party as part of the res gestae of the crime committed against her at the trial for the latter offense. However, the rule as presented in *Miller*, because of the factual situation from which it arose, could not be extended to make the wife a competent witness to testify at a separate proceeding against her husband concerning his crime against a third party. This is the effect which the *Briley* court gave to the res gestae rule.

The issue in *Briley* presented itself in Pennsylvania in *Commonwealth v. Clanton*.[66] The defendant's alleged wife was allowed to testify against him as to crimes committed upon herself and a third person who was with her at the time. The Pennsylvania statute[67] excluded evidence of the spouse of the accused except in criminal prosecutions for violence done or threatened upon the other or minor child of either.

The testimony was allowed because it was discovered that at the time of the witness's alleged marriage to the defendant, she was already married to another; therefore a valid marriage between her and the defendant did not exist.[68] The court, however, discussed the problem of deciding the competency of the spouse to testify under the Pennsylvania statute, which would have presented itself had the marriage been a valid one. It stated:

> The Pennsylvania Act was intended to make competency the rule and incompetency the exception and a narrow construction of the act would often result in suppressing the truth. Nevertheless, the language of the act cannot be ignored in pursuit of its spirit even though a broad or liberal construction would obviously protect society in criminal cases where a wife is an eye witness to a murder committed by her husband. Especially would admissibility

64. 78 Neb. 645, 649, 111 N.W. 637, 639 (1907).
65. Smith v. State, 86 Tex. Cr. 624, 628, 219 S.W.2d 454, 456 (1949); *cf.* Brown v. State, 33 Ala. App. 97, 31 So. 2d 670 (1946); People v. James, 40 Cal. App. 2d 740, 105 P.2d 947 (1940). *See generally* 1 J. WIGMORE, EVIDENCE § 218 (3rd ed. 1940).
66. 395 Pa. 521, 151 A.2d 88 (1959).
67. PA. STAT. ANN. tit. 19, § 683 (1936).
68. 395 Pa. 521, 528, 151 A.2d 88, 92 (1959).

> seem wise if it were legally permitted where the shooting of the victim and the defendant's wife is as here, so interwoven as to be actually one event.[69]

The above statement from *Commonwealth v. Clanton* entails two important concepts. First, the court shows an obvious hesitancy to go beyond the actual language of the statute in order to make a witness competent. Secondly, it draws attention to a distinction which must be made between that which a court thinks is right and wise, or on the contrary unwise and outmoded, and that which is legally permissible.

It appears that the *Briley* case disregarded both of the concepts emphasized by the Pennsylvania court. The *Briley* court gave the spirit of the New Jersey rules of evidence making competency the rule and incompetency the exception,[70] priority over the actual language of Rule 23(2) which provides that, "[t]he spouse of the accused in a criminal action shall not testify . . . unless . . . (b) the accused is charged with an offense against the spouse. . . ."[71] The decision appears to be based on public policy rather than on a strict determination of what is legally permissible under the statute.

Statutes Retaining the Common Law Privilege Must be Strictly Construed

Historically, statutes disqualifying the spouse of the accused from being a witness have been strictly construed. The United States Supreme Court in *Bassett v. United States*[72] held that polygamy was not to be considered a crime committed by the husband against the wife within the language of the Utah Code of Civil Procedure.[73] After stating the Utah statutory rule the Supreme Court declared:

> We do not doubt the power of the legislature to change this ancient and well-supported rule, but an intention to make such a change should not lightly be imputed. Before such a departure from the rule . . . can be judged, the language declaring the legislative will should be so clear as to prevent doubt, as to its intent and limit.[74]

Where the statute is unambiguous, however, it has been held that the clear expressed intent of the legislature must be given effect, and there is no occasion for interpretive construction.[75]

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69. *Id.* at 527, 151 A.2d at 92.
70. *See* note 25 and accompanying text *supra.*
71. N.J. Stat. Ann. § 2A:84A-17(2) (1968).
72. 137 U.S. 496 (1890).
73. No. 123, [1886] Utah Acts 111 (now Utah Code Ann. § 77-44-4 (1953).
74. 137 U.S. at 505.
75. *See* State v. Riley, 83 Ida. 346, 362 P.2d 1075 (1961). This case held that carnal abuse of a minor child of the wife of the accused was not criminal violence against the wife, within the language of Idaho Code

Another ground for strictly construing such statutes is that they are in derogation of the common law. Such reasoning was used by the Supreme Court of Arkansas in *Jenkins v. State*[76] in interpreting that state's statute[77] providing that the spouse of the accused could testify as to an injury committed by either upon the person or property of the other. The court defined the word "property" as being limited to real or personal property and not including children; thus, the husband of the accused could not testify against her at the trial for murder of their child.[78] Similarly, in *Grier v. State*[79] it was stated:

> A wife is not permitted to testify at all except as a matter of exception to the general rule and the provision for her testifying being an exception it cannot be liberally extended and must be strictly construed.[80]

An objective construction of the controlling statutes demands that the court not pass upon the reasons underlying the statute or on the wisdom thereof. A lack of good reason is a basic ground for legislative change.[81] If the courts were to take a free hand in enlarging the statutory rules as they see fit, the result would be judicial legislation. Such judicial conduct would to a large measure abrogate the husband-wife privilege itself, a function which is solely for the legislature. This was the substance of the reasoning presented in *Cargill v. State*[82] which held that under the language of the Oklahoma statute,[83] a wife was not a competent witness against her husband in a prosecution against him for rape of her daugher. The crime according to the court had to be one against the marital state as well as against society and common decency.[84] The court feared that an innocent spouse might be charged with commission of an offense against one of their children for the specific purpose of terminating the marriage relation.[85]

In some cases, however, the statutory language has been ex-

ANN. §§ 9-2031-3002 (1948). The court, therefore, held that the wife could not testify against her husband.

76. 191 Ark. 625, 87 S.W.2d 78 (1935).

77. Act of Mar. 17, 1903, No. 81, § 1, [1903] Ark. Acts 141. (now ARK. STAT. ANN. § 43-2020 (1948).

78. 191 Ark. 625, 628, 87 S.W.2d 78, 80 (1935).

79. 153 Ga. 321, 123 S.E. 210 (1924).

80. *Id.* at 326, 123 S.E. at 214.

81. *See* Cargill v. State, 25 Okla. Crim. 314, 220 P. 64 (1923); Meade v. Commonwealth, 186 Va. 775, 43 S.E.2d 858 (1947).

82. 25 Okla. Crim. 314, 220 P. 64 (1923).

83. No. 428, [1912] Okla. Acts 279 (now OKLA. STAT. ANN. tit. 22, § 702 (1969).

84. 25 Okla. Crim. 314, 317, 220 P. 64, 66 (1923).

85. *Id.*

tended. A minority of jurisdictions have held that the language, "crime one against the other," in statutes which frame the exception to the rule of incompetency in such language,[86] is broad enough to be considered as including any crime against a child as one against the mother.[87] Thus, in *Chamberlain v. State*[88] it was held that the word "crime" in the Wyoming statute[89] meant "wrong" against the other; therefore, the wife of the accused was permitted to testify against him in a prosecution for statutory rape of her daugher. The statute was held to show a legislative intent to broaden the extension from the common law.[90]

The wrong, which the decisions extending the exception to crimes committed against a child of the wife seek to alleviate, is that particular wrong to the spouse which occurs when a crime is committed against her or her child.[91] The cases which hold that testimony of one spouse should be admitted against the other do so because the crime of the other spouse has resulted in a wrong committed against the testifying spouse for which he or she should have legal redress.[92] In no case, other than *Briley*, has the exception been extended by the judiciary to allow testimony as to a crime against a third person, not a child of the witness.

CONCLUSION

In *State v. Briley* the wife's testimony was the only evidence available, other than the testimony of the defendant himself. The court was obviously concerned with the injustice to the public which would have occurred if the testimony of the defendant's wife concerning the homicide of the third party had been held inadmissible. It is submitted that it was this concern and not an objective construction of the New Jersey rules of evidence which led the New Jersey Supreme Court to hold as it did.

One can foresee other circumstances in which an assertion of the husband-wife privilege would lead to the suppression of otherwise credible and admissible evidence. For example, a case may

86. *E.g.*, ALASKA R. CRIM. PROC. 26(b)(2) (Supp. Sept. 1966).
87. *See* 8 J. WIGMORE, EVIDENCE § 2239 (3rd ed. 1940).
88. 348 P.2d 280 (Wyo. 1960).
89. WYO. STAT. ANN. § 1-142 (1957).
90. 348 P.2d 280, 283 (Wyo. 1960).
91. *See* O'Loughlin v. People, 90 Colo. 368, 10 P.2d 543 (1932), holding that similar language in the Colorado statute, No. 29, § 1 of 1929, Colo. Laws 642 (now COLO. REV. STAT. ANN. § 154-1-7 (1963), was broad enough to include any crime, whether of violence to the person, or other crime committed by the husband or wife directly affecting the other.
92. *But see* State v. Kollenborn, 304 S.W.2d 855 (Mo. 1957). This court, in interpreting the common law exception, held that it was not only for the protection of the injured spouse but also for the sake of public justice. The court allowed the wife to testify because she was the only witness to the husband's crime upon her child. The holding can be distinguished by the fact that the court is interpreting the common law rule rather than a statutory enactment.

arise where spouse *A* kills a third person in the presence of spouse *B*, whose sole function is that of a witness. If the jurisdiction in which the crime occurs is governed by a statute retaining the husband-wife privilege, the spouse who witnessed the act must be held incompetent to testify without the accused's consent. Thus, the prosecution is deprived of the testimony of the only eye-witness to the crime and must rely solely on other evidence available, if any exists. This evidence may or may not be sufficient to sustain a conviction.

In the final analysis, the policy of preventing one spouse from being the instrument of the other's condemnation must be balanced against the duty of the courts to see that criminal acts do not go unpunished. The strictness of the common law rule has been gradually alleviated by statute to the extent that today over two-fifths of the jurisdictions allow either spouse to be a competent witness for or against the other under any cricumstances.[93] In the minds of these legislatures, the public policy of seeing that all crime are punished outweighs the protection of marital sanctity. The legislatures in the remaining states, including New Jersey, have not gone to that extreme. They apparently still see good reason for allowing the husband-wife privilege to remain as an evidentiary rule. Instead of abrogating the privilege, they have set out a list of exceptional situations in which the rule would create an injustice to the parties of the marriage and to the public.[94] Such statutes are the product of years of legislative and judicial experience. They cannot easily be expanded by the judiciary, and those states which have done so have relied upon expanding or interpreting the definition of key words within the statutes themselves. These statutes may be inadequate in many respects, in that situations may arise where the rule will work an injustice, but the judiciary should not be the compensatory factor for myopic legislation.

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93. *See* statutes cited note 13 *supra*.
94. *See* statutes cited note 20 *supra*.