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EVIDENTIARY PRIVILEGE: PRIVILEGE OF DEFENDANT TO PREVENT ADVERSE SPOUSAL TESTIMONY ABOLISHED—*Trammel v. United States*, 100 S. Ct. 906 (1980).

INTRODUCTION

The privilege[1] of the defendant in a criminal trial to prevent adverse spousal testimony, often called the anti-marital facts privilege,[2] has been recognized since at least 1580.[3] Although it had undergone some changes,[4] it virtually remained intact, especially in the federal courts, until the recent decision of *Trammel v. United States*.[5] In its early stages of development, what is today labeled a privilege was not actually a privilege, but instead a disqualification: husband and wife were deemed incompetent to testify for or against each other.[6] This disqualification was believed necessary for two reasons: 1) the existence of the privilege against self-incrimination,[7] and 2) the evidentiary rule which was thought to avoid the risk of perjury by preventing the defendant from taking the stand in his own behalf.[8] These rules, combined with the attitude that husband and wife were one unit, resulted in the disqualification.[9] The defendant could not take the stand

1. Privileges are not mere exclusionary rules like those excluding hearsay or certain character evidence; they are substantive laws created to foster or affect the conduct and/or status of individuals outside court. While privileges do exclude certain evidence from a judicial proceeding, this exclusion is merely a means of effecting a state policy considered more important; it is never an end in itself. Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CALIF. L. REV. 1353, 1358 (1973).

2. 2 J. WIGMORE, EVIDENCE § 600, at 212 (McNaughton rev. 1961). The label "anti-marital facts" has been used to signify the testimony of husband or wife against the other. *Id.* at 210.

3. An English case is reported which predates even the now obsolete disqualification of spouses to testify, adversely or favorably, at their spouses' trials. Bent. v. Allot, 21 Eng. Rep. 50 (Ch 1580). Even though a woman was allowed to testify at her husband's trial, incriminating testimony was prohibited.

4. The evolution of the privilege is discussed briefly in the material which follows. For a more thorough history, see Wigmore's examination of the privilege, 8 J. WIGMORE, EVIDENCE §§ 2227-28, at 210-22 (McNaughton rev. 1961).

5. 100 S. Ct. 906 (1980).

6. 8 J. WIGMORE, EVIDENCE § 2227, at 211-212 (McNaughton rev. 1961).

7. U.S. CONST. amend. V, § 1.

8. Jin Fuey Moy v. United States, 254 U.S. 189 (1920), *overruled*, Funk v. United States, 290 U.S. 371 (1933). *See also* Comment, *Husband-Wife Evidentiary Privileges: The Power of the Federal Courts to Seek a Rational Solution*, 17 ST. LOUIS U. L.J. 107, 107-09 (1972) [hereinafter cited as *Husband-Wife*] for a discussion of the historical rationale for the privilege.

9. *See Husband-Wife, supra* note 8, at 109.

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in his own behalf because of the risk of self-serving falsehoods, and could not testify adversely because of the privilege against self-incrimination. It followed that the defendant's spouse should also be disqualified, because they were considered to be a single unit.[10] The spouse, therefore, was deemed incompetent to give reliable testimony.

In the federal courts this incompetency was eroded gradually, until in *Funk v. United States*,[11] the Supreme Court ruled that a spouse may testify favorably for a defendant. Procedure had changed to allow defendants to testify in their own behalf, and the Court reasoned that there was no longer any justification for disqualification of spouses. It was apparent to the Court that if the risk of the jury being misled by perjured testimony is not too great to prevent the defendant from taking the stand, then there should be no basis for disqualification of the defendant's spouse to avoid false testimony.[12] The Court in *Funk* noted further that the domain of competency was being expanded, and that this general trend also required a ruling that favorable testimony by the witness spouse be allowed.[13] *Funk* changed what had been disqualification into a privilege that allowed the defendant to prevent adverse spousal testimony.[14]

The privilege in its post-*Funk* state persisted, despite a great deal of criticism,[15] and was soundly reaffirmed by the Supreme Court in *Hawkins v. United States*.[16] The most frequently expounded modern justification for preserving the privilege is the need to avoid the marital disharmony which would be created if one spouse were to give testimony adverse to the other. The oft-repeated criticism of this rationale is that if one spouse is willing to testify against the other there must be little harmony left to preserve.[17]

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10. *Id.*
11. 290 U.S. 371 (1933).
12. *Id.* at 377.
13. *Id.* at 376.
14. Hawkins v. United States, 358 U.S. 74, 76 (1958).
15. For a number of years commentators have been strongly denouncing the privilege as being without a rational basis. Few have written stronger criticism than Wigmore, who states:

> The record of judicial ratiocination defining the grounds and policy of this privilege forms one of the most curious and entertaining chapters of the law of evidence. It is curious because the variety of ingenuity displayed, in the invention of reasons 'ex post facto' for a rule so simple and so long accepted, could hardly have been believed but for the recorded utterances.

8 J. WIGMORE, EVIDENCE § 2228 at 213 (McNaughton rev. 1961). *See also*, C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 89 (2d ed. 1972).
16. 358 U.S. 74 at 76 (1958).
17. 8 J. WIGMORE, EVIDENCE § 2228, at 216 (McNaughton rev. 1961).

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The privilege affirmed by the *Hawkins* decision for use in the federal courts was actually three separate privileges:

1) The right of the witness spouse to refuse to testify against the defendant spouse;
2) The privilege of the defendant spouse to prevent the witness spouse from testifying adversely; and
3) The privilege of the defendant spouse to prevent the revelation of confidential marital communications.[18]

Until the *Trammel* decision, the three-part privilege above remained consistently in force in the federal courts, albeit subject to a few exceptions.[19] The *Trammel* decision eliminated the privilege of the defendant to prevent adverse spousal testimony.

In the state courts, four separate paths have been taken. A small minority of states retain the entire *Hawkins* rule, and make the witness spouse incompetent to testify adversely, whether the defendant asserts the privilege or not.[20] Slightly less than one third of the states follow the *Hawkins* rule, protecting the privilege of the defendant to bar adverse spousal testimony by timely objection.[21] Another small group

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18. 358 U.S. 74 (1958).

19. To avoid injustice wherever possible, exceptions to the rule have been created that permit the defendant's spouse to give testimony. One exception has been called the "necessity" exception. In cases where the defendant has committed a crime against the spouse, the spouse is allowed to give testimony and the defendant may not stop it by asserting the marital privilege. *See, e.g.*, United States v. Cameron, 556 F.2d 752 (5th Cir. 1977); Ryan v. Commissioner, 568 F.2d 531 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978); United States v. Smith, 533 F.2d 1077 (8th Cir. 1976).

A second, more recent, exception has developed where the victim is the child of either spouse. In these cases, most jurisdictions again allow adverse spousal testimony and refuse to acknowledge the defendant's privilege to exclude it. *See, e.g.*, United States v. Allery, 526 F.2d 1362 (8th Cir. 1975). *Contra*, State v. McGonigal, 89 Idaho 177, 403 P.2d 745 (1965).

Additionally, Congress and many state legislatures have created statutory exceptions. Among these are cases in which the defendant is accused of bigamy or charged with a violation of the Mann Act. *See* Wyatt v. United States, 362 U.S. 525 (1960) in which the defendant's wife was wrongly compelled to testify in her husband's trial for Mann Act violations, but the testimony was held to be admissible.

20. Eight states follow the strict incompetency rule. An example of a statute which makes the defendant's spouse incompetent is OHIO REV. CODE ANN. § 2945.42 (Page 1975 & Supp. 1979). Section 2945.42 provides in relevant part:

> Husband and wife are competent witnesses to testify in behalf of each other in all criminal prosecutions, and to testify against each other in all actions, prosecutions, and proceedings for personal injury of either by the other, bigamy, or failure to provide for, neglect of, or cruelty to their children . . . .

Note that even in the strictest form of statute upholding the privilege, exceptions to the privilege are still recognized. *See* 100 S. Ct. 906, 911 n.9 for a listing of the states following the strict incompetency rule.

21. Sixteen states treat the exclusion of adverse spousal testimony as a privilege

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of states retains only the confidential communications privilege, and the privilege of the witness spouse to refuse to testify.[22] About one third of the states have totally abolished the privilege for either the defendant or the witness spouse in criminal cases, allowing protection only of confidential marital communications.[23]

FACTS AND DECISION

In 1976, Otis Trammel and two others were indicted for importing heroin, and conspiracy to import heroin from the Philippines to California.[24] Defendant Trammel's wife, Elizabeth Ann, had been apprehended with heroin in her possession during a customs search after a flight from Thailand.[25] She was arrested, and, in exchange for immunity, agreed to cooperate with the federal authorities.[26]

At the hearing on a motion to sever his case from the other two defendants, Trammel attempted to prevent his wife's adverse testimony, relying on the common law privilege to support his contention that it should not be admitted at trial.[27] The motion to sever was denied, and the District Court ruled that Mrs. Trammel could testify as to any act observed or any communication made in the presence of a third person, stating that only confidential communications would be

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which the defendant may choose to assert. *See, e.g.*, N.J. STAT. ANN. § 2A:84A-17 (West 1976). The relevant portion of the New Jersey statute provides: "The spouse of the accused in a criminal action shall not testify in such action . . . unless a) such spouse and the accused both shall consent." Comment 9 to this statute makes clear that calling defendant's spouse as a witness will not be an error if the defendant fails to object. *See* 100 S. Ct. 906, 911 n.9 for a complete list of states which uphold the anti-marital facts privilege of the defendant.

22. Nine states vest the anti-marital facts privilege in the witness spouse. Among them is California. CAL. EVID. CODE § 970 (West 1966) provides in part: "Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding." The accompanying comments make it clear that defendant spouses no longer have the privilege to prevent witness spouses from testifying against them. This is the approach which the Supreme Court followed in *Trammel*. *See*, 100 S. Ct. at 911 n.9 for a complete list of state statutes which shift the marital privilege to the witness spouse.

23. Seventeen states have abolished the privilege completely in criminal cases. *See* ARIZ. REV. STAT. ANN. § 12-2231 (Supp. 1979) which provides: "In a civil action 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 see* ARIZ. REV. STAT. ANN. § 12-2232 (Supp. 1979) which acknowledges that confidential communications between husband and wife are still privileged in criminal actions. *See* Trammel v. United States, 100 S. Ct. at 911, for the remaining sixteen states that have abolished the privilege.

24. 100 S. Ct. at 908. The importing of heroin and the conspiracy to import heroin are both federal criminal offenses as defined by the United States Code. 21 U.S.C. §§ 952(A), 963 (1976).

25. 100 S. Ct. at 908.

26. *Id.*

27. *Id.*

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held privileged and excluded from testimony.[28] Accordingly, Elizabeth Trammel was permitted to give the testimony which resulted in Otis Trammel's conviction.[29]

On appeal to the United States Court of Appeals for the Tenth Circuit,[30] Trammel again attempted to exclude his wife's testimony, citing the Supreme Court case of *United States v. Hawkins*,[31] in support of his claim. Trammel lost on appeal, the tenth circuit ruling that the *Hawkins* decision did not apply to the testimony of a spouse who appeared as an unindicted co-conspirator under a grant of immunity.[32]

Trammel appealed to the Supreme Court of the United States which granted *certiorari*. The Supreme Court unanimously affirmed the lower courts' decision, but not on the ground that the *Hawkins* rule was inapplicable to these facts. The *Trammel* court chose instead to overrule *Hawkins*, thus removing the common law privilege of the defendant to prevent adverse spousal testimony for all cases and not just under the narrow set of facts of a grant of immunity.[33]

ANALYSIS

A. *Effect of the Decision.*

The decision of the Supreme Court in *Trammel* to overrule *Hawkins* does not abolish all three parts of the common law privilege.[34] The Court expressly declared that confidential marital communications were not being dealt with in *Trammel*, and accordingly remain unchanged by the decision.[35] Additionally, the Court emphasized that the witness spouse may not be compelled to testify adversely

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28. *Id.*

29. *Id.* Elizabeth Trammel's testimony was the only evidence which the government presented in its case against Trammel. *Id.*

30. United States v. Trammel, 583 F.2d 1166 (10th Cir. 1978).

31. 358 U.S. 74 (1958). In *Hawkins*, the Court examined the common law privilege to bar adverse spousal testimony. The Court determined that the need to promote marital harmony was still a valid reason for retaining the privilege, and reaffirmed the existence of this privilege in the federal courts.

32. Trammel v. United States, 583 F.2d at 1168-69 (10th Cir. 1978). The opinion of the tenth circuit discusses the definite ruling in *Hawkins* which clearly affirmed the common law privilege, but notes that in the *Hawkins* opinion the Supreme Court stated that the courts have "the right and responsibility to examine the policies behind the federal common law privileges and to alter, modify, or amend them when reason and experience so demand." *Id.* at 1168. The court further explained that this was a case in which reason and experience compelled the finding that the privilege did not override the governmental grant of immunity.

33. 100 S. Ct. at 914.

34. *See* text accompanying note 18 *supra* (for an explanation of the three separate parts of the privilege).

35. 100 S. Ct. at 912-13.

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against the defendant spouse.[36] The Court left these two parts of the privilege intact, but completely erased the most widely-used of the three, the privilege of the defendant to stop adverse spousal testimony.[37]

Under the *Trammel* decision, the defendant's spouse may voluntarily give adverse testimony against the defendant, but cannot be compelled to do so.[38] The effect of this is to shift control over the exercise of this privilege from the defendant to the witness spouse. The defendant may only assert the common law privilege to stop spousal testimony which involves disclosure of communications made in confidence during marriage. The privileges which remain apply whether the defendant is the husband or the wife.[39]

By overruling *Hawkins*, the Supreme Court in *Trammel* finally eliminated a long standing bar to obtaining evidence in criminal trials. In view of a similar trend in the state courts,[40] and the abundance of scholarly criticism,[41] the decision is startling, if at all, only in its occurrence without apparent new justification.[42] Rather, as Justice Stewart stated in his concurring opinion, the foundation for the privilege has disappeared, and such a decision is overdue.[43]

B. *The Court's Rationale.*

In reaching its decision to overturn *Hawkins*, the Court acknowledged that the common law justifications for the privilege and the modern rationale are no longer appropriate.[44] The concept of husband and wife being one has been abandoned.[45] It is generally acknowledged also, that prevention of adverse spousal testimony does not really promote marital harmony, and therefore, the claim of preservation of the family relationship does not justify the exclusion of impor-

36. *Id.* at 914.
37. *Id.*
38. *Id.*
39. *Id.*
40. *See* notes 20-23 and accompanying text *supra.*
41. See note 18 *supra*; Trammel v. United States, 100 S. Ct. 906, 909 n.4, 912 n.11.
42. Justice Stewart makes this the basis of his concurring opinion, in which he criticized the Burger opinion for adopting a position that was not accepted in *Hawkins*, but without any rationale that is new to the *Trammel* decision. 100 S. Ct. at 914.
43. *Id.*
44. *Id.* at 913.
45. In tort law intrafamily and intraspousal immunities were based on this concept and in recent years it has been abandoned and the immunities, for the most part, abolished. *See* W. PROSSER, LAW OF TORTS, § 122 (4th ed. 1971).

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tant and voluntary testimony.[46] To further support its decision to eliminate the privilege, the Court noted that attitudes toward marriage are changing,[47] and that in a marriage where one spouse is willing to testify adversely to the other, nothing the courts can do is likely to save the marriage.[48]

Justice Stewart, in his concurring opinion, criticized the Burger opinion for only considering the types of rationales which were available when the Court declined to eliminate the privilege in *Hawkins v. United States*.[49] Justice Stewart stated that although the reasons offered for abandoning the privilege are ample, the same reasons were rejected by the Court in 1958 as not sufficient to justify abandoning the privilege.[50] To qualify this reversal of opinion, the Court stated that "reason and experience" dictate such a change.[51] This statement does little to explain the basis for the Court's change of position on this matter.

The *Trammel* Court relied heavily on language in *Hawkins* which stated that although the marital privilege was being affirmed in its entirety, it was not intended to foreclose changes which might eventually be dictated by reason and experience.[52] Additionally, the Court placed considerable emphasis on the argument that the privilege upheld in *Hawkins* did not really promote marital harmony when the spouse was willing to testify adversely.[53]

With respect to the Court's strong emphasis on these two points, Justice Stewart is correct in his statements that the majority has merely accepted what was dismissed as unconvincing by the *Hawkins* decision.[54] Burger's opinion does hint that the change of stance was partially a result of the changing role of marriage,[55] but falls short of

46. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, § 77 (2d ed. 1972).

47. 100 S. Ct. at 913. The Court commented that women are no longer regarded as chattels or denied separate legal identity. The opinion quotes a passage from a divorce case, Stanton v. Stanton, 421 U.S. 7 (1975), as reason for abandoning the ancient basis for the privilege.

48. 100 S. Ct. at 913. The Court commented that when the spouse is willing to testify adversely, "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." *Id.*

49. *Id.* at 914.

50. *Id.*

51. *Id.*

52. 358 U.S. at 79.

53. 100 S. Ct. at 913.

54. *Id.* at 914.

55. *Id.* at 913, (quoting Stanton v. Stanton, 421 U.S. 7 (1975), Burger states: "[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." *Id.* at 14-15).

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explaining exactly what has occurred since 1958 to call for this change in approach. Justice Stewart's criticism of the Court's argument that marital harmony is not really promoted by the privilege is also valid. The argument itself is compelling and sound, but as Justice Stewart notes, the Court unanimously rejected the same reasoning in *Hawkins*.[56]

These, however, are not the only reasons the Court relied upon for abandoning the privilege. The flaw in the majority opinion was not a failure to supply any rationale for a reversal by the Court, but was rather a misplaced emphasis. Two justifications for modification of the *Hawkins* rule were set forth by the majority. First, the Burger opinion states that some modification to allow voluntary adverse testimony by the witness spouse is now the majority approach among the states.[57] The opinion indicates that this was significant to the Court because marriage and domestic relations are areas of concern traditionally reserved to the states.[58] Second, the Court acknowledged an argument that the interest in arriving at truth outweighs the need to avoid the possibility of creating marital disharmony. This argument was not discussed in the *Hawkins* majority opinion. Justice Stewart made a similar argument, however, in his concurring opinion in *Hawkins*,[59] when he stated, "[A]ny rule that impedes the discovery of truth in a court of law impedes as well the doing of justice."[60]

The Court in *Trammel* stopped at the mere conclusion that on balance, upholding the anti-marital facts privilege is not sufficient justification for excluding significant evidence.[61] This rationale, combined with the existence of a similar trend among the states, provides a more convincing justification for modification of the *Hawkins* rule, and should have been given more emphasis by the Court. Since the witness spouse has always had the right to give adverse testimony, the *Hawkins* rule served only to prevent willing spouses from testifying. This was an unnecessary suppression of important testimony.

These apparent shortcomings in analysis can perhaps be overlooked because the opinion will probably be viewed with disfavor by very few. Any problems with the opinion result more from an attempt to justify the stance taken in *Hawkins* than from lack of support for

56. 358 U.S. at 77.
57. 100 S. Ct. at 911.
58. *Id.* at 912.
59. 358 U.S. at 81.
60. *Id.*
61. 100 S. Ct. at 914.

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the *Trammel* approach. The Court cited several commentators whose writings provide rationale for eliminating the privilege.[62]

The Court avoided dealing with confidential communications because no marital communications were involved in the *Trammel* case. The Court did note, however, that the privilege to prevent disclosure of confidential marital communications would remain unchanged by *Trammel*.[63] A reason for the Court's avoidance of this issue may be the tradition of the Supreme Court to decide only issues necessary to the case at bar. To deal with an issue not before the Court would only produce dicta.[64] It can be expected, however, that as a result of the *Trammel* decision issues relating to the confidential communications privilege will frequently arise. If defendants can no longer bar adverse testimony simply because it comes from their spouses, they will try to stretch the confidential communications privilege to eliminate the testimony.

Since the Court in *Trammel* changed a procedural rule which predates this country, some guidelines for use of what remains of the privilege will eventually be necessary. Accompanying the *Trammel* Court's statement that confidential communications were not at issue is a citation to a case which does not provide a helpful definition of what communications will be privileged.[65] In jurisdictions which acknowledge the existence of the confidential communications privilege,[66] considerable confusion and increased litigation have resulted as to what constitutes a privileged communication.[67] The Supreme Court has not resolved the confusion in past decisions, preferring to decide the issue on a case by case basis.[68] The *Trammel* decision makes

62. *Id.* at 909.

63. 100 S. Ct. at 913.

64. Texas Ry. Comm'n. v. Pullman Co., 312 U.S. 496, 498 (1941).

65. Blau v. United States, 340 U.S. 332 (1951), which the *Trammel* decision cited, provides no definition or standard for determining what is a confidential communication. The *Blau* opinion states that marital communications are presumptively confidential. *Id.* at 333 (citing Wolfle v. United States, 291 U.S. 7 (1934). The standard which *Wolfle* provides is as follows:

> 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 is made, was obviously not intended to be confidential, it is not a privileged communication.

Id. at 14.

66. Virtually all of the state statutes, even those completely abolishing the marital privilege, still protect the confidential marital communications privilege. See notes 20-23 *supra*.

67. For a discussion of the confusion surrounding privileged communications, see *Husband-Wife, supra*, note 8 at 110-15.

68. Blau v. United States, 340 U.S. 332 (1951).

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privileged communications the only part of the privilege which the defendant may still assert. Overuse of this aspect of the privilege may result in confusion warranting future guidelines by the Supreme Court.

CONCLUSION

The decision of the Supreme Court in *Trammel* to eliminate the privilege of the defendant to bar adverse spousal testimony is a significant step toward making important evidence accessible in criminal trials. Since witness spouses may still refuse to give testimony, the *Trammel* rule may not be used to force unwilling persons to become adversary to their spouses, but will avoid forcing witnesses to protect guilty individuals simply because they are married to them. As Justice Stewart pointed out in his concurring opinion, the Court has adopted a position clearly superior to the *Hawkins* rule.[69] *Trammel* is an indication that the Court has finally accepted what scholars have been asserting for years. In closing his concurring opinion, Justice Stewart wrote:

> The court is correct when it says that '[t]he ancient foundations for so sweeping a privilege have long since disappeared' . . . . But those foundations had disappeared well before 1958; their disappearance certainly did not occur in the few years that have elapsed between the *Hawkins* decision and this one. To paraphrase what Mr. Justice Jackson once said in another context, there is reason to believe that today's opinion of the Court will be of greater interest to students of human psychology than to students of law.[70]

To eliminate the common law obstacle to obtaining evidence, the federal courts will make modifications in accordance with *Trammel*. Additionally, the number of state courts abolishing the privilege or shifting it to the witness spouse will probably increase to a more substantial majority. Because *Trammel v. United States* involves a procedural issue, it will not be mandatory authority for the state courts.[71] Those twenty-six states which have already abolished the privilege entirely or shifted it to the witness spouse will have significant support for their choice. The remaining twenty-four states will still be free to ignore *Trammel*, but at least a few can be expected to find the decision persuasive.

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69. See note 66 *supra*.
70. 100 S. Ct. at 914.
71. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

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