

## ADVERSE SPOUSAL PRIVILEGE: DEAD OR ALIVE?

The adverse spousal privilege<sup>1</sup> developed at common law to enable a defendant to prevent his spouse from testifying against him in a criminal trial. In *Trammel v. United States*,<sup>2</sup> the Supreme Court apparently abolished this privilege by vesting the privilege solely in the witness spouse.

Commentators interpret *Trammel* to allow only a witness spouse to invoke the adverse spousal privilege. If the witness spouse is willing to testify, the defendant spouse cannot prevent such testimony.<sup>3</sup> This Note asserts that *Trammel* does not extend that far. Instead, courts should grant the defendant spouse the right to challenge the voluntariness of adverse spousal testimony, thereby restoring some semblance of the spousal privilege.

Part I of this Note provides the historical basis for the adverse spousal privilege.<sup>4</sup> Part II raises questions that *Trammel* did not resolve. Part

---

1. The adverse spousal privilege is commonly referred to as the "marital privilege." This Note uses the two terms interchangeably. For a detailed history of this privilege, see generally 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2227 (1961).

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

3. See, e.g., Note, *Evidence—The Marital Privilege*, 4 AM. J. TRIAL ADVOC. 455, 456 ("[T]he Supreme Court [in *Trammel*] held that the witness spouse alone could make the decision whether or not to testify."); Note, *Evidence—Privilege Regarding Non-Confidential Marital Testimony is Vested Only in Witness Spouse*, 11 CUM. L. REV. 465, 468 n.21 (1980).

Commentators criticized *Trammel*, claiming the decision facilitates prosecutorial abuse and promotes fundamental unfairness. See, e.g., Lempert, *A Right to Every Woman's Evidence*, 66 IOWA L. REV. 725, 730, 737 (1981) (*Trammel* will result in prosecutorial abuse and fundamental unfairness); see also Note, *Evidence—Privilege Against Adverse Spousal Testimony*, 55 TUL. L. REV. 961, 969 ("One potential outcome of this decision is the possibility of government abuse by the overzealous prosecutor.").

4. This Note addresses the marital privilege in the context of criminal litigation. Use of the privilege in civil cases is not within the scope of this Note. See *Ryan v. Commissioner*, 568 F.2d 531, 544 (7th Cir. 1977) (the rehabilitation rationale underlying the privilege in criminal cases is not applicable in civil cases). In addition, use of other family privileges and use of the privilege against confidential marital communications are not within the scope of this Note. For a discussion of various family privileges, see *In re Mathews*, 714 F.2d 223 (2nd Cir. 1983) (grand jury witness may not invoke family privilege to avoid incriminating in-laws); *United States v. Jones*, 633 F.2d 817 (4th Cir. 1982) (adult grand jury witness may not invoke family privilege to avoid answering certain questions about father); *In re Agosto*, 553 F. Supp. 1298 (D. Nev. 1983) (parent-child privilege prohibits forcing child to testify against father).

For a discussion of the privilege against confidential marital communications, see, e.g., *United States v. Cameron*, 556 F.2d 752, 755 (5th Cir. 1977) (distinguishing between adverse spousal privilege and privilege against confidential marital communications); see also R. CARLSON, E. IM-

III traces the common-law development of a defendant's right to object to coerced confessions and testimony. Finally, Part IV concludes that even after *Trammel*, a defendant spouse should have the right to challenge the voluntariness of a witness spouse's testimony.

## I. MARITAL PRIVILEGES: HISTORY, TYPES, AND EXCEPTIONS

### A. *Historical Development*

The marital privilege originated at early English common law. In *Bent v. Allot*,<sup>5</sup> decided over four centuries ago, an English court first recognized a defendant's right to prevent his wife from testifying against him. Shortly after *Bent*, another English court held that a prosecutor could not elicit testimony from a defendant's wife in a bankruptcy proceeding.<sup>6</sup> Later, Lord Coke recognized this privilege in one of his commentaries,<sup>7</sup> noting that a wife can not testify for or against her husband.<sup>8</sup>

History provides a variety of rationales for the marital privilege. The traditional rationale was the notion that husband and wife are a single legal entity, and therefore, one cannot testify against the other.<sup>9</sup> The modern explanation for the privilege rests on the policy argument that society desires to preserve marriage,<sup>10</sup> foster family peace,<sup>11</sup> and avoid

---

WINKELRIED, & E. KIONKA, MATERIALS FOR THE STUDY OF EVIDENCE 116 (1983) (referring to "two separate and distinct doctrines applicable to spousal testimony").

5. 21 Eng. Rep. 50 (1580). See also 8 J. WIGMORE, *supra* note 1, § 2227, at 211 (referring to *Bent* as "the earliest explicit ruling" on the privilege).

6. See 1 Brown & Gold 47, 123 Eng. Rep. 656 (1613) (common law provides that the prosecution may not examine the wife of the bankrupt against her husband). Several decades later, an English court recognized one exception to the marital privilege recognized in *The Lord Audley's Case*, 123 Eng. Rep. 1140, 1141 (1631) ("[I]n a case of a common person, between party and party she could not [be a witness against her husband]. . . but between the king and the party. . . she may [be a witness against her husband]."). See also 8 WIGMORE, *supra* note 1, § 2228, at 213 n.9 (discussing *The Lord Audley's Case*).

7. See COKE, A COMMENTARIE UPON LITTLETON 6b (1628).

8. Application of the adverse spousal privilege has arisen almost exclusively in situations involving a defendant husband preventing a witness wife from testifying. See Lempert, *supra* note 3, at 727 ("[Spousal immunity] has almost always been used to bar the testimony of wives against their husbands. Of the hundreds of cases I have seen. . . only a handful involve men in a position to incriminate their wives."). But see *Paul v. United States*, 79 F.2d 561 (3d Cir. 1935) (husband testified against wife charged with check forgery).

9. See *Davis v. Dinwoody*, 100 Eng. Rep. 1241 (1792); *Winham v. Chetwynd*, 1 Burrows 414 (K.B. 1757). See also J. WIGMORE, *supra* note 1, § 2228, at 215 (when the common law binds a man and his wife together as one, no individual shall part them).

10. See, e.g., *Trammel v. United States*, 445 U.S. 40, 44 (1980) ("The modern justification for this privilege against adverse spousal testimony is its perceived role in fostering the harmony and sanctity of the marriage relationship.").

the repugnance associated with one spouse contributing to the other's imprisonment.<sup>12</sup>

The United States Supreme Court first acknowledged the marital privilege in *Stein v. Bowman*.<sup>13</sup> In *Stein*, the prosecution introduced as evidence a widow's deposition that her husband had accepted a bribe.<sup>14</sup> While recognizing various exceptions to the marital privilege,<sup>15</sup> the Court noted that the privilege against adverse spousal testimony protected domestic relations from public exposure and preserved family peace.<sup>16</sup> The Court concluded that the privilege applied even though the witness' husband was deceased and there was no marriage to preserve.<sup>17</sup>

The Supreme Court's initial treatment of the marital privilege precluded a spouse from testifying either for or against a defendant spouse.<sup>18</sup> In the 1930s, the Court abandoned its position that a witness spouse was incompetent to testify in favor of a defendant spouse.<sup>19</sup> The privilege against *adverse* spousal testimony, however, remained intact.<sup>20</sup>

---

11. See, e.g., *Hawkins v. United States*, 358 U.S. 74, 77 (1958) ("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.").

12. See J. WIGMORE, *supra* note 1, § 2228, at 217 (There exists "a natural repugnance in every fair-minded person [regarding] compelling a wife or husband to be the means of the other's condemnation.").

13. 38 U.S. 209 (1839).

14. *Id.* at 211, 223.

15. The Court recognized the following exceptions to the marital privilege: treason, violence by one spouse against the other, and confidential communications. *Id.* at 222.

16. "The rule. . . protects the domestic relations from exposure, [and] rests upon considerations connected with the peace of families." *Id.* at 222-23.

17. *Id.* at 223.

18. *Graves v. United States*, 150 U.S. 118, 121 (1893) ("In this case the wife was not a competent witness either in behalf of, or against her husband; if he had brought her into court, neither he nor the government could have put her upon the stand.").

19. *Funk v. United States*, 290 U.S. 371, 380 (1933) ("Whatever was the danger that an interested witness would not speak the truth. . . its effect has been minimized almost to the vanishing point by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances.").

20. In *Wolfe v. United States*, 291 U.S. 7 (1934), the Court recognized that federal courts are free to interpret witness competency rules based upon evolving common-law principles. *Id.* at 12. *Wolfe* enabled federal courts to reevaluate periodically the validity of the marital privilege. *Wolfe* formed the basis of Rule 26 of the Federal Rules of Criminal Procedure. *Wolfe* and the Federal Rules of Criminal Procedure opened the door for a split to develop between the circuits over a defendant spouse's ability to bar a witness spouse's adverse testimony. At least three circuit courts recognized a defendant spouse's privilege. See, e.g., *United States v. Walker*, 176 F.2d 564 (2nd Cir. 1949) (wife not competent witness against husband charged with illegally transporting stolen money), *Brunner v. United States*, 168 F.2d 281 (6th Cir. 1948) (wife not competent witness against husband charged with improperly obtaining another's mail); *Paul v. United States*, 79 F.2d 561 (3rd

By the 1950s, federal and state courts and legislatures had crafted varying exceptions to the marital privilege,<sup>21</sup> resulting in its inconsistent application.<sup>22</sup> In 1958, the Supreme Court reconsidered a defendant's right to bar adverse spousal testimony in an effort to standardize application of the privilege. In *Hawkins v. United States*,<sup>23</sup> the defendant was accused of violating the Mann Act.<sup>24</sup> The trial court allowed the defendant's wife, a self-professed prostitute, to testify against her husband.<sup>25</sup> On appeal, the Supreme Court reversed, holding that a court may not admit voluntary spousal testimony if the defendant spouse objects.<sup>26</sup> The Court thus rejected the Government's attempt to vest this privilege solely in the witness spouse.

After *Hawkins*, the Supreme Court sent Congress the Proposed Federal Rules of Evidence, including Rule 5-05. Rule 5-05 would have codified *Hawkins*, enabling a federal criminal defendant to prevent his spouse from testifying against him.<sup>27</sup> Congress, however, rejected the Court's

---

Cir. 1935) (husband not competent witness against wife charged with forging checks). The Tenth Circuit, however, adopted the view that a wife may testify against her husband in his criminal trial. See, e.g., *Hawkins v. United States*, 249 F.2d 735, 736 (10th Cir. 1957) (wife competent witness against defendant husband), *aff'd*, 445 U.S. 40 (1980); *Yoder v. United States*, 80 F.2d 665 (10th Cir. 1935) (wife competent witness against husband in his criminal prosecution occurring after divorce).

21. See, e.g., *State v. Pennington*, 124 Mo. 388, 27 S.W. 1106 (1894) (wife competent to testify against husband charged with assaulting her). See generally Note, *Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend*, 38 VA. L. REV. 359, 362-67 (1952).

22. By 1952, thirteen states had adopted the marital privilege. Twenty-five states had recognized the competency of spouses to testify against one another with respect to nonconfidential marital communications, but had granted either spouse an optional privilege. Ten states had entirely eliminated the privilege. See Note, *supra* note 21, at 362-67.

23. 358 U.S. 74 (1958).

24. *Id.* at 74.

25. Although the husband objected to his wife's testimony, the trial court allowed the prosecution to introduce the wife's testimony into evidence. *Id.* at 74-75. On appeal, the Tenth Circuit held that a witness spouse may testify over a defendant spouse's objections in a criminal case. *Id.* at 75. The court alternatively argued that even if the witness spouse were not a competent witness, her testimony was harmless to defendant. *Id.* at 79.

26. *Id.* at 75-79. The Court rejected the Tenth Circuit's alternative argument of harmless error, stating that the witness spouse's testimony that she was a prostitute both before and after her marriage might influence the jury's determination of the defendant's intent. *Id.* at 80.

27. Rule 5-05 of the Proposed Federal Rules of Evidence read in full:

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) Exceptions. There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the

attempt to federalize privilege law.<sup>28</sup> Instead, Congress adopted Rule 501, which grants federal courts authority to determine evidentiary rules on a case-by-case basis guided by common-law principles.<sup>29</sup> Subsequently, state judicial and legislative action gradually continued to erode the marital privilege.<sup>30</sup> The Supreme Court again moved to clarify the scope of the privilege.

### B. *Trammel v. United States*

In *Trammel v. United States*,<sup>31</sup> the Court modified *Hawkins*, vesting the marital privilege in the witness spouse. In *Trammel*, Otis and Elizabeth Trammel allegedly brought heroin into the United States.<sup>32</sup> Elizabeth later obtained additional heroin overseas. When she returned to the United States, customs agents discovered the heroin and arrested her. The Government indicted Otis and two others for importing heroin.<sup>33</sup> Drug Enforcement Administration agents persuaded Elizabeth to cooperate with the Government, granting her immunity in return for her testimony at trial.<sup>34</sup>

---

marriage, or (3) in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328, or with transporting a female in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421-2424.

46 F.R.D. 161, 263 (1969).

28. See R. CARLSON, E. IMWINKELRIED, & E. KIONKA, *supra* note 4, at 116 (even though rejected by Congress, "the proposed rules are instructive and have persuasive authority"). *But see* *Trammel v. United States*, 445 U.S. at 47 ("In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege.").

29. Rule 501 reads in full:

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.

FED. R. EVID. 501.

30. For a comprehensive review of the Proposed Federal Rules of Evidence and the marital privilege in the post-*Hawkins*/pre-*Trammel* era, see generally Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CALIF. L. REV. 1353 (1973); Note, *Spousal Testimony*, 28 BROOKLYN L. REV. 259 (1962) (Note prepared for New York State Joint Legislative Committee on Matrimonial Laws).

31. 445 U.S. 40 (1980).

32. *Id.* at 42.

33. *Id.*

34. *Id.* at 42-43.

Prior to his trial, Otis attempted to prevent Elizabeth from appearing as a witness by asserting the *Hawkins* privilege against adverse spousal testimony.<sup>35</sup> The district court, however, permitted Elizabeth to testify against Otis, and her testimony proved central to the Government's case. The district court ultimately found Otis guilty.<sup>36</sup> The court of appeals affirmed the conviction.<sup>37</sup>

The Supreme Court affirmed the lower court decisions,<sup>38</sup> unanimously holding that only a witness spouse may invoke the adverse spousal privilege.<sup>39</sup> If the witness spouse is willing to testify, "whatever the motivation," the defendant spouse can not prevent the testimony.<sup>40</sup> The Court reached its conclusion for five principal reasons. First, commentators had widely criticized the *Hawkins* rule.<sup>41</sup> Second, Rule 501 evidenced congressional intent to continue the evolutionary development of testimonial privileges.<sup>42</sup> Third, recent state law trends had eroded the marital privilege.<sup>43</sup> Fourth, courts should strictly construe privileges because society is entitled to "every man's evidence."<sup>44</sup> Finally, if one spouse willingly testifies against the other, there is probably little marital harmony to preserve.<sup>45</sup>

---

35. *Id.* at 43.

36. *Id.*

37. 583 F.2d 1166 (10th Cir. 1978).

38. Justice Burger delivered the Court's opinion, and Justice Stewart wrote a concurring opinion.

39. The *Trammel* Court observed that the *Hawkins* rule, which excludes testimony related to criminal acts and communications by the defendant in the presence of third persons, sweeps more broadly than other testimonial privileges, which exclude only confidential communications. 445 U.S. at 52. The Court then considered the trade-off between fostering family peace and fostering justice. The Court balanced those competing interests, concluding that "[w]hen one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve." *Id.* Finally, apparently in response to the question whether Elizabeth *willingly* testified, the Court stated that her testimony was not *involuntary* simply because she testified under immunity and a promise of lenient treatment. *Id.* at 53.

40. *Id.* at 52. *Trammel* did not directly affect the privilege against confidential marital communications. *Id.* at 52 (the Court referred to the independent rule protecting confidential marital communications).

41. 445 U.S. at 50 n.11. The criticisms include direct authoritative commentary and implied legislative disfavor, evidenced by Congress' rejection of Proposed Rule 5-05 and acceptance of Rule 501. *See supra* notes 27 & 29.

42. 445 U.S. at 47.

43. *Id.* at 49 n.9.

44. *Id.* at 50 (citing *United States v. Nixon*, 418 U.S. 683, 709-10 (1974), for the proposition that testimonial privileges should be strictly construed).

45. *Id.* at 52.

### C. *Post*—Trammel: *Commentary and Judicial Responses*

After *Trammel*, commentators expressed concern that the decision would allow prosecutorial abuse and would unfairly treat the defendant spouse.<sup>46</sup>

Federal courts, however, quickly adopted the *Trammel* holding,<sup>47</sup> citing it as authority to erode other testimonial privileges<sup>48</sup> and to justify exceptions to the marital privilege.<sup>49</sup> State courts adopted *Trammel* more slowly. Several state courts rejected *Trammel*, finding their state statutory provisions inconsistent with the holding.<sup>50</sup> Most state courts, however, eventually adopted *Trammel* and cited the holding to govern other testimonial privilege cases<sup>51</sup> and to create exceptions to the marital

---

46. See *supra* note 3.

47. See, e.g., *Commodity Futures Trading Comm'n v. Weintraub*, 722 F.2d 338, 340 (7th Cir. 1983); *United States v. El Paso Co.*, 682 F.2d 530, 538 (5th Cir. 1982); *Royal Embassy of Saudi Arabia v. S.S. Mt. Dirfys*, 537 F. Supp. 55, 56 (E.D. N.C. 1981); *United States v. Boffa*, 513 F. Supp. 517, 522 (D. Del. 1981).

48. Several federal cases cite the *Trammel* rationale but distinguish the husband/wife relationship. See, e.g., *In re Zuniga*, 714 F.2d 632, 637 (6th Cir. 1983) (distinguishing husband/wife relationship from priest/penitent relationship); *Doe v. United States*, 711 F.2d 1187, 1193 (2d Cir. 1983) (distinguishing husband/wife relationship from psychiatrist/patient relationship); *Somer v. Johnson*, 704 F.2d 1473, 1479 (11th Cir. 1983) (distinguishing husband/wife relationship from doctor/hospital relationship); *United States v. Gordon*, 655 F.2d 478, 486 (2nd Cir. 1981) (same); *In re International Horizons, Inc.*, 16 Bankr. 484, 489 (Bankr. N.D. Ga. 1981) (distinguishing husband/wife relationship from accountant/client relationship).

49. The circuit courts are divided as to whether the adverse spousal privilege is subject to an exception when the witness and the defendant are alleged substantial joint participants in the crime. Compare *United States v. Koecher*, 755 F.2d 1022 (2d Cir. 1985) (the joint participant exception does not apply to the adverse spousal privilege in a grand jury proceeding), *cert. granted*, 54 U.S.L.W. 3190 (U.S. Oct. 7, 1985) (No. 84-1922) and *Appeal of Malfitano*, 633 F.2d 276 (3d Cir. 1980) (same) with *United States v. Clark*, 712 F.2d 299 (7th Cir. 1983) (contra); *Trammel v. United States*, 583 F.2d 1166 (10th Cir. 1978) (same), *aff'd on other grounds*, 445 U.S. 40 (1980); *United States v. Van Drunen*, 501 F.2d 1393, 1396 (7th Cir.) (same), *cert. denied*, 419 U.S. 1091 (1974).

50. See *People v. Thompson*, 111 Mich. App. 324, 314 N.W.2d 606 (1981) (citing *Trammel* for insight into policy even though *Trammel* conflicts with Michigan statute); *People v. Wadkins*, 101 Mich. App. 272, 300 N.W.2d 542 (1980) (Michigan statute may preclude result reached in *Trammel*); *State v. Pendergras*, 621 S.W.2d 68 (Mo. Ct. App. 1981) (Missouri continues to recognize adverse spousal privilege despite trend mentioned in *Trammel*); *State v. Roberts*, 633 P.2d 1214 (Mont. 1981) (*Trammel* applies only in federal court and is contrary to Montana statutory law); *Young v. State*, 603 S.W.2d 851 (Tex. Crim. App. 1980) (court unconvinced that *Trammel* should determine privilege in Texas); *State v. Evans*, 287 S.E.2d 922 (W. Va. 1982) (trial court erred in holding *Trammel* affects West Virginia statute even if defendant and witness are divorced at time of trial).

51. See, e.g., *Welfare Rights Org. v. Crisan*, 33 Cal. 3d 766, 190 Cal. Rptr. 919, 661 P.2d 1072 (1982) (same); *Dickenson v. Superior Court*, 135 Cal. App. 3d 93, 185 Cal. Rptr. 97 (1982) (attorney/client); *People v. Thompson*, 133 Cal. App. 3d 419, 184 Cal. Rptr. 72 (1982) (priest/penitent); *Law Offices of Morley v. MacFarlane*, 647 P.2d 1215 (Colo. 1982) (same); *People v. Taylor*, 618

privilege.<sup>52</sup> Neither federal nor state courts, however, have adequately addressed several questions that *Trammel* failed to resolve.

## II. *TRAMMEL*'S UNANSWERED QUESTIONS

The *Trammel* Court stated that if a witness spouse is *willing* to testify, the defendant spouse can not prevent the testimony.<sup>53</sup> The Court, however, failed to specify whether the defendant spouse may challenge the willingness of the witness spouse to testify. If the defendant spouse can pose such a challenge, the Court also failed to define what the defendant spouse must show in order to prove the witness spouse's lack of willingness to testify.

In order to answer these questions, it is helpful to review an analogous line of cases concerning coerced confessions and testimony. In certain circumstances, a defendant has the right to object to the voluntariness of another individual's statement on the ground that the statement violates

---

P.2d 1127 (Colo. 1980) (physician/patient); *Wender v. United Servs. Auto. Assoc.*, 434 A.2d 1372 (D.C. App. 1981) (attorney/client); *In re Marriage of Gaumer*, 303 N.W.2d 136 (Iowa 1981) (psychologist/patient); *Commonwealth v. Clemons*, 427 N.E. 2d 761 (Mass. App. 1981) (psychotherapist/patient); *Greene v. New England Ins. Co.*, 108 Misc. 2d 541 (N.Y. Sup. Ct. 1981) (physician/patient).

52. *See, e.g.*, *Osbourne v. State*, 623 P.2d 784 (Alaska 1981) (no privilege if "eve-of-trial" marriage); *State v. Williams*, 133 Ariz. 220, 650 P.2d 1202 (1982) (no privilege as to premarriage illegal matters); *People v. McGregor*, 635 P.2d 912 (Colo. Ct. App. 1981) (crime against the other spouse exception); *State v. McKenney*, 101 Idaho 149, 609 P.2d 1140 (1980) (no privilege if husband deserts or does not support wife or child); *Commonwealth v. Boarman*, 610 S.W.2d 922 (Ky. App. 1980) (child abuse exception); *Three Juveniles v. Commonwealth*, 390 Mass. 357, 455 N.E.2d 1203 (1983) (civil action exception, even if spousal testimony highly destructive of the marriage), *cert. denied sub nom. Keefer v. Massachusetts*, 104 S. Ct. 1421 (1984); *People v. Love*, 127 Mich. App. 596, 339 N.W.2d 493 (1983) (exception if witness spouse is victim of defendant spouse in single criminal event for which defendant spouse is on trial, even if crime against witness does not reach same dimension of criminality as crime against third party); *People v. Thompson*, 111 Mich. App. 324, 314 N.W.2d 606 (1981) (crime against the other spouse exception); *State v. Vicars*, 207 Neb. 325, 299 N.W.2d 421 (1980) (no privilege as to wife's testimony relating to husband's rape of another); *Shults v. State*, 96 Nev. 742, 616 P.2d 388 (1980) (no privilege as to wife's statement to policeman); *In re Vitabile*, 188 N.J. Super. 61, 455 A.2d 1151 (no privilege in nonaccusatory proceeding because no accused to invoke the privilege), *cert. denied*, 95 N.J. 506, 468 A.2d 168 (1983); *People v. D'Amato*, 105 Misc.2d 1048, 430 N.Y.S.2d 521 (N.Y. Sup. Ct. 1980) (no privilege if witness wife was "virtual prisoner" of defendant husband and marriage in "utter shambles"); *People v. St. John*, 74 A.D. 2d 85, 426 N.Y.S.2d 863 (N.Y. App. Div. 1980) (exception as to defendant's threat to rape daughter); *State v. Freeman*, 302 N.C. 591, 276 S.E.2d 450 (1981) (no privilege if defendant accused of murdering spouse's brother in spouse's presence); *Brown v. Commonwealth*, 223 Va. 601, 292 S.E.2d 319 (1982) (crime against the other exception applies if one "integrated criminal transaction").

53. *See supra* note 40 and accompanying text.

the defendant's fourteenth amendment due process rights.<sup>54</sup>

### III. COERCED CONFESSIONS AND TESTIMONY

A defendant's right to object to the evidentiary use of an involuntary confession evolved from constitutional considerations. In *Brown v. Mississippi*,<sup>55</sup> the Supreme Court held that a conviction based solely upon a confession extracted by physical torture violates a defendant's due process rights under the fourteenth amendment.<sup>56</sup> In *Chambers v. Florida*,<sup>57</sup> the Court extended *Brown* by recognizing that a confession extracted by mental torture also violates due process rights.<sup>58</sup>

Courts note several justifications for excluding coerced confessions, including the inherent lack of trust in the confession<sup>59</sup> and the desire to discourage law enforcement officials from coercing confessions.<sup>60</sup> In *Rogers v. Richmond*,<sup>61</sup> the Supreme Court noted that this exclusionary rule serves the important function of protecting a defendant's exercise of his free will.<sup>62</sup>

In *Jackson v. Denno*,<sup>63</sup> the Supreme Court established a procedural mechanism, referred to as a "*Jackson v. Denno* voluntariness hearing," to ensure that involuntary confessions do not affect jury determinations of guilt or innocence.<sup>64</sup> By claiming that his confession was involuntary, a defendant can require a separate hearing to determine the truth of his claim.<sup>65</sup> The voluntariness determination may not be made by the same jury ultimately charged with determining the defendant's guilt or innocence.<sup>66</sup>

In addition to a criminal defendant's ability to challenge the voluntari-

---

54. See *infra* notes 55-71 and accompanying text.

55. 297 U.S. 278 (1936).

56. *Id.* at 287.

57. 309 U.S. 227 (1940).

58. *Id.* at 235-41.

59. See Allen, *Due Process and State Criminal Procedure: Another Look*, 48 NW. U.L. REV. 16, 19 (1953).

60. See *Jackson v. Denno*, 378 U.S. 368, 386 (1963).

61. 365 U.S. 534 (1961).

62. *Id.* at 544.

63. 378 U.S. 368 (1963).

64. *Id.* at 377-96. See *Lego v. Twomey*, 404 U.S. 477, 485 (1972) (*Jackson* procedure "designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances").

65. 378 U.S. at 391.

66. *Id.* at 391 n.19 (voluntariness to be determined by trial judge, another judge, or another jury, but not by convicting jury).

ness of his own confession, a defendant may challenge the voluntariness of another witness' testimony. In *LaFrance v. Bohlinger*,<sup>67</sup> the defendant claimed that a witness' out-of-court statement was involuntary and therefore inadmissible to impeach the witness' favorable in-court testimony.<sup>68</sup> The First Circuit Court of Appeals adopted the defendant's argument, holding that when a *Jackson v. Denno* voluntariness hearing produces substantial evidence that threats and duress evoked a statement or confession, courts must exclude the statement or confession.<sup>69</sup> In addressing the issue of the defendant's standing to challenge the voluntariness of the witness' statement, the court explained that the defendant was asserting his own, and not the witness', constitutional rights.<sup>70</sup> The use of *any* individual's involuntary testimony against a defendant violates the *defendant's* due process rights to a fair trial.<sup>71</sup>

---

67. 499 F.2d 29 (1st Cir.), *cert. denied*, 419 U.S. 1080 (1974).

68. The witness to the alleged crime claimed at trial that he had made earlier adverse statements to the police "because he was strung out on drugs, frightened, and willing to say anything to get back to his cell." *Id.* at 31.

69. "It is unthinkable that a statement obtained by torture or by other conduct belonging in a police state should be admitted at the government's behest in order to bolster its case." *Id.* at 34. *See also* *Vargas v. Brown*, 512 F. Supp. 271, 275 (D. R.I. 1981) (stating fundamental premise of *LaFrance* as "refusal to permit Government to utilize in any way an involuntary statement" stemming from "abhorrence of the official lawlessness").

70. 499 F.2d at 32-36. *See* *Vargas v. Brown*, 512 F. Supp. at 275 (*LaFrance* "emphasized that the defendant's *own* due process rights were implicated by use of a witness' involuntary statement"); *see also* *United States ex rel. Cunningham v. DeRobertis*, 719 F.2d 892, 896 (7th Cir. 1983) ("violation of another's fifth amendment rights may rise to the level of a violation of his own right to a fair trial").

71. 499 F.2d at 35. The Supreme Court denied certiorari to *LaFrance* and has not considered the issue whether a defendant may challenge the voluntariness of witness statements. 419 U.S. 1080 (1974). In addition to the First Circuit, the Fifth and Seventh Circuits arguably have approved *LaFrance*. *See, e.g.,* *United States ex rel. Cunningham v. DeRobertis*, 719 F.2d 892 (7th Cir. 1983); *Blackwell v. Franzen*, 688 F.2d 496 (7th Cir. 1982), *cert. denied*, 460 U.S. 1072 (1983); *United States v. Fredericks*, 586 F.2d 470, 481 n.14 (5th Cir. 1978), *cert. denied*, 440 U.S. 962 (1979).

Other federal courts have cited *LaFrance* approvingly in the context of coerced confession cases. *See, e.g.,* *United States v. Kearney*, 682 F.2d 214 (D.C. Cir. 1982); *United States v. Scott*, 592 F.2d 1139 (10th Cir. 1979); *United States v. Powe*, 591 F.2d 833 (D.C. Cir. 1978); *Rivera v. Warden, Attica Correctional Facility*, 431 F. Supp. 1201 (E.D. N.Y. 1977).

Seven state jurisdictions have considered *LaFrance*. *See, e.g.,* *Chapman v. State*, 302 So.2d 136, 138 n.1 (Fla. Ct. App. 1974) (no voluntariness determination required because issue not raised at trial or on appeal); *People v. Bates*, 25 Ind. App. 3d 748, 324 N.E.2d 88 (1975) (limiting *LaFrance* to voluntariness of testimony at trial only); *Commonwealth v. Harris*, 371 Mass. 462, 358 N.W.2d 982 (1976) (*LaFrance* requires jury consideration of voluntariness); *Franklin v. State*, 33 Md. App. 690, 336 A.2d 111 (dealing with the level of proof required for voluntariness determination), *rev'd on other grounds*, 281 Md. 51, 375 A.2d 1116 (1977), *cert. denied*, 434 U.S. 1018 (1978); *State v. Langley*, 25 N.C. App. 298, 212 S.E.2d 687 (citing *LaFrance* approvingly in context of coerced confession case), *cert. denied*, 287 N.C. 467, 215 S.E.2d 627 (1975); *State v. Wolery*, 46 Ohio St. 2d 316, 348

#### IV. THE ANSWERS TO *TRAMMEL*'S UNANSWERED QUESTIONS

##### A. *The Defendant's Right to Challenge Voluntariness*

*LaFrance* enabled a criminal defendant to challenge the voluntariness of a witness' statement on due process grounds.<sup>72</sup> *Trammel* held that a defendant spouse can not prevent the testimony of a witness spouse who is willing to testify, "whatever the motivation."<sup>73</sup>

At first glance, *Trammel*'s holding seems to foreclose any inquiry into what motivates a spouse to testify adversely. A closer look reveals this is not the case. The *Trammel* Court stated its holding in the context of a witness motivated by a grant of immunity and a promise of lenient treatment.<sup>74</sup> It is unlikely that the *Trammel* Court intended its "whatever the motivation" language to encompass situations involving physical or mental abuse.

If *Trammel* forecloses a defendant's inquiry into the voluntariness of a witness spouse's adverse testimony, then *Trammel* should also foreclose a defendant's inquiry into the voluntariness of a nonspousal witness' adverse testimony.<sup>75</sup> This result would overrule *LaFrance* in all situations, even though *Trammel* did not consider *LaFrance* or the due process issues *LaFrance* raised. Obviously, the *Trammel* Court did not intend such a broad result. Even after *Trammel*, a defendant spouse retains the right to challenge the voluntariness of a witness spouse's testimony.

Granting the defendant spouse the right to challenge the voluntariness of adverse spousal testimony is consistent with *Trammel*'s vesting the spousal privilege solely in the witness spouse. If a separate *Jackson v. Denno* voluntariness hearing determines that the witness spouse's testimony is voluntary, the defendant spouse may not prevent the witness spouse from testifying.

##### B. *The Meaning of Voluntariness in the Trammel Context*

A *LaFrance* voluntariness inquiry seeks to ensure witness credibility,

---

N.E.2d 351 (witness testimony is not inadmissible merely because of promise of immunity; only violence, torture, and inhumane coercion render testimony untrustworthy and therefore inadmissible), *cert. denied*, 429 U.S. 932 (1976).

72. 499 F.2d at 35.

73. See *supra* note 40 and accompanying text.

74. See text accompanying *supra* note 34.

75. This conclusion could be avoided only by the illogical argument that the desire to eliminate police brutality and to elicit truthful testimony is subject to diminution when the witness and defendant are spouses.

reliability, and trustworthiness.<sup>76</sup> A defendant can show that a statement was involuntary by proving that brutality, torture, or subtle police techniques induced the statement.<sup>77</sup> The question arises whether this *LaFrance* voluntariness standard should also apply in the *Trammel* context. This Note asserts that a more lenient standard should apply.

In addition to seeking to ensure witness credibility, reliability, and trustworthiness, the *Trammel* Court sought to balance society's interest in preserving marital harmony and family peace.<sup>78</sup> The different purposes behind the voluntariness inquiries in *LaFrance* and *Trammel* suggest that the same voluntariness standard is not appropriate for both settings.

The *Trammel* Court found that the witness spouse's testimony was voluntary because there was probably no marital harmony and family peace left to preserve.<sup>79</sup> Therefore, the voluntariness standard in the *Trammel* context should turn upon an inquiry into the level of marital harmony and family peace remaining in the defendant and witness spouses' marriage. If a sufficient degree of marital harmony and family peace exists, the witness spouse's statement should be deemed involuntary, and the defendant spouse should have the right to exclude the testimony on due process grounds. Of course, a witness spouse's statement induced by brutality, torture, or subtle police techniques should also be deemed involuntary in accordance with *LaFrance*.

## V. CONCLUSION

Permitting a defendant spouse to challenge the voluntariness of adverse spousal testimony will satisfy concerns of fundamental unfairness and risk of prosecutorial abuse.<sup>80</sup> A *Jackson v. Denno* voluntariness

---

76. See *State v. Wolery*, 46 Ohio St. 2d 316, 348 N.E.2d 351 (promise of immunity not enough to render testimony coerced and thus inadmissible; only "violence, torture, or other forms of inhumane coercion" make testimony inherently untrustworthy and violative of due process), *cert. denied*, 429 U.S. 932 (1976).

77. See, e.g., *Vargas v. Brown*, 512 F. Supp. 271 (D.C. R.I. 1981); *Johnson v. Hall*, 465 F.Supp. 516 (D.C. Mass.), *aff'd*, 605 F.2d 577 (1st Cir. 1979); *Commonwealth v. Mahnke*, 368 Mass. 662, 335 N.E.2d 660 (1975), *cert. denied*, 425 U.S. 959 (1976); *State v. Wolery*, 46 Ohio St.2d 316, 348 N.E.2d 351, *cert. denied*, 429 U.S. 932 (1976).

78. See *supra* notes 38-44 and accompanying text.

79. *Id.*

80. Granting defendants the right to challenge the voluntariness of spousal testimony would not hinder a witness spouse's opportunity for immunity or lenient treatment. If a prosecutor offers a witness spouse leniency in return for testimony, the witness would fulfill her part of the bargain by refraining from invoking her privilege. The defendant spouse could then request a voluntariness

hearing provides an appropriate procedural mechanism to settle spousal challenges. Challenges to spousal voluntariness will continue to vest the spousal privilege solely in the witness spouse, consistent with *Trammel*. At the same time, these challenges will preserve a degree of the spousal privilege commensurate with the balance of societal interests struck by the *Trammel* Court.

*Tom A. Glassberg*

---

hearing. If the hearing showed insufficient voluntariness to invoke the *Trammel* rule, the court would bar the testimony. The witness spouse, however, would still be entitled to lenient treatment because of her offer to testify. The proposed voluntariness challenge would therefore reduce the risk of prosecutorial abuse by encouraging prosecutors to offer leniency to a witness spouse only if her testimony were likely to meet voluntariness standards.

