The Deconstruction of the Marital Privilege

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"... the confidence of the marital relationship... 'the best solace of human existence.'"1

"We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."2

I. INTRODUCTION

Deconstruction is a philosophical position, a political or intellectual strategy, and a mode of reading. Above all, it is a methodology of argument, "both rigorous argument within philosophy and displacement of philosophical categories or philosophical attempts at mastery."3 The evolution of the marital privilege in American law has occurred through just such a process. On a case-by-case basis in

1. Trammel v. United States, 445 U.S. 40, 51 (1980) (quoting Stein v. Bowman, 38 U.S. (13 Pet.) 209, 223 (1839)). In Trammel, the Supreme Court established the marital privilege as it exists today. It affirmed lower courts' rulings that confidential communications between husband and wife are privileged, but the witness-spouse may neither be compelled nor foreclosed from testifying. Trammel, 445 U.S. at 53. See infra notes 83-97 and accompanying text.

2. Griswold v. Connecticut, 381 U.S. 479, 486 (1965). In Griswold, the Supreme Court held a Connecticut statute forbidding the use of contraceptives unconstitutional because it was an impermissible intrusion upon "an intimate relation of husband and wife and their physician's role in one aspect of that relation." Id. at 482. See infra notes 193-95 and accompanying text.

3. J. CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM 85 (1982). In light of this definition of deconstruction, the application of the methods of deconstruction to the evolution of the common law ought not to seem surprising. Deconstructive analysis has created controversy in literary studies, where it currently enjoys great if highly qualified success, precisely because it challenges the domination of any single canonical meaning. See infra note 8. However, the evolution of the common law depends upon an entirely self-conscious and deliberate methodology that proceeds by displacement of prior definitions, reached by rigorous argument within the context of those definitions.

Two debts should be acknowledged at the onset of this endeavor. I am indebted to Professor Homer Obed Brown of the University of California, Irvine, for discussions about deconstruction in the context of contemporary literary theory. I am indebted also to Special Attorneys Geoffrey A. Anderson, Laurence R. Leavitt, and Stanley W. Parry of the United States Department of Justice for the opportunity to see first-hand the invocation, scope, and limitations of the present-day marital privilege in a federal court. See infra note 176. The conflation of deconstruction and the marital privilege is my own; none of these gentlemen is in any way liable for the discussion and analysis which follows here.
the light of reason and experience,⁴ each articulation and definition of the marital privilege has resulted from rigorous argument within the confines of common law. Yet, within each case's varying factual circumstance, the courts have successively displaced prior philosophical categories and philosophical attempts at mastery.

The consequent status of the marital privilege today has been most often seen as the virtual destruction and disappearance of the marital privilege—or at least its devolution into two incompatible, mutually exclusive, and strictly limited privileges: the adverse spousal testimony privilege and the confidential marital communication privilege. Both privileges are commonly presumed to be subject to further diminution, if not outright disappearance, in terms of practical efficacy.⁵

However, an examination of the marital privilege since Trammel v. United States ⁶ in 1980 reveals that it has in fact persisted, and has done so as an increasingly coherent and unified privilege.⁷ The process of deconstruction is not the process of destruction, nor does the displacement of the philosophical categories or attempts at mastery that are the presuppositions of definitions or articulations of the marital privilege invalidate either the privilege, or the method of analysis by which it has been formulated. What has occurred has not been the invalidation of the marital privilege, but rather a process of deconstructive resolution.⁸

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⁴ See infra notes 25, 68, 80-82 and accompanying text.
⁵ See, e.g., United States v. Neal, 743 F.2d 1441, 1444 (10th Cir. 1984) (citing the trial court's comment that "as a practical matter, the United States Supreme Court in Trammel . . . may have intended to eliminate the communication privilege altogether"); United States v. Jones, 683 F.2d 817, 818 (4th Cir. 1982) (Trammel operates "to narrow, not expand, the scope of marital testimonial privilege"); United States v. Tsinnijinnie, 601 F.2d 1035, 1038 (9th Cir.), cert. denied, 445 U.S. 966 (1979) (movement has been toward restriction of marital privilege, which has been singled out for particularly harsh criticism). See also C. McCormick, HANDBOOK OF THE LAW OF EVIDENCE §§ 66, 86 (2d ed. 1972) (criticizing both privileges); 8 J. Wigmore, EVIDENCE § 2228 (rev. ed. 1961) (disapproving the adverse spousal testimony privilege as "illogical and unfounded"); Haney, The Evolutionary Development of Marital Privileges in Federal Criminal Trials: Constraining the Invocation and Growth of Spousal Privileges in Federal Criminal Cases by Interpreting the Common Law in the "Light of Reason and Experience," 6 NAT'L J. CRIM. DEF. 99 (1980) (federal courts' historical inclination to limit or even eliminate such exclusionary devices as the marital privilege); Purdy, The Marital Privilege: A Prosecutor's Perspective, 18 CRIM. L. BULL. 309, 309 (1982) ("In recent years the privilege has been viewed with greater skepticism as courts try to weigh the importance of the marital relationship against the society's interest in obtaining testimonial evidence"); Comment, The Husband-Wife Privileges of Testimonial Non-Disclosure, 56 NW. U.L. REV. 208, 230 (1961) (protection of marital communications a worthy end, but privilege with respect to adverse spousal testimony incapable of surviving close and critical analysis); Note, Expanded Waiver of Marital Privileges in Missouri, 47 MO. L. REV. 888, 892 (1982) ("The development of the rules of evidence has resulted in waning support for these privileges").
⁷ See infra notes 182-95 and accompanying text.
Deconstruction is "an analysis that focuses on the grounds of [a] system's possibility. The critique reads backwards . . . to show . . . that the starting point is not a (natural) given but a (cultural) construct, usually blind to itself." On a case-by-case basis, each successive ruling on a marital privilege is a critique of prior rulings, reading backwards to find a ground in the given common law for an unequivocal definition of that privilege. That ruling in turn, either as binding or persuasive authority, becomes part of the common law, a starting point for each succeeding argument in each succeeding case that is no more natural than its predecessors. Rather it is a cultural construct—a cultural construct, moreover, that is blind to itself.

In this deconstructive process is the key to the evolution of the marital privilege and its present status. The marital privilege ostensibly arose from the common law disqualification of interested parties, a rhetorical ground which has disappeared for all intents and purposes from case law. The cultural institution of marriage itself has become increasingly beseiged by changing social mores.

The marital privilege, however, has not disappeared, nor is it likely to do so in the future. This is because it is phenomenologically grounded in the marital relationship itself: "those peculiarly confi-

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9. Johnson, supra note 8, at xv.
10. See infra notes 20-21, 37 and accompanying text.
idential relations" of husband and wife;11 "a right of privacy older than the Bill of Rights . . . intimate to the degree of being sacred;"12 the relationship that is "the best solace of human existence."13 These phrases are quoted from Supreme Court opinions spanning nearly a century. Stated in the terms of deconstructive analysis, the privilege has persisted because it was and is phenomenally prior to its ground in the cultural construct, and therefore is equally the cause and origin of its successive definitions. Each successive definition was arrived at by the deconstruction of the prior definitions, involving the explicit criticism and disapproval of the cultural constructs which were its rhetorical grounds.

With the erosion of the first cultural constructs, the marital privilege may have appeared to devolve and fragment into limited and separate privileges. However, in this deconstructive process, the marital privilege has been the persistent fertile ground from which a new cultural construct is emerging. This emergent construct is potentially rhetorical ground and logical cause for the marital privilege in the future, and for other privileges beyond the marital privilege. In addition, freed from the burden of argument and rationalization based on an outmoded cultural construct, the marital privilege itself has emerged as increasingly coherent and unified.

The phrase that has been the hallmark of the marital privilege since Benson v. United States, the "peculiarly confidential relations" of husband and wife,14 epitomizes the deconstructive process. It is an explicit statement that rhetorically and logically follows on the common law doctrine of disqualification and the cultural institution of marriage, as the culturally defined bases for that disqualification. Those cultural constructs are its explicit presuppositions. Based solely on those cultural constructs, the marital privilege is now problematical. However, the meaning of the phrase, "the peculiarly confidential relationship of husband and wife," cannot be unequivocally linked to those cultural constructs, nor has it been so linked in the case law in which the marital privilege has been defined and redefined since Benson. This phrase has also signified the phenomenological grounds of an emergent cultural construct, the right to privacy.15

This comment focuses on the persistence of the marital privilege—

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15. See infra notes 193-95 and accompanying text. See generally Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890). The right to privacy has developed into an increasingly important doctrine from its beginnings in that article to one of constitutional dimensions.
in the expansion, contraction and shifting of the scope of the privilege in its case-by-case evolution. What follows here is the tracing of the marital privilege from its first modern American formulation in Benson, through its devolution into “two privileges,” and its reemergence, since Trammel in 1980, as a single phenomenological formulation. The emphasis is on the present status of the privilege as defined in the cases decided since Trammel under the authority of Rule 501 of the Federal Rules of Evidence. At this point, five years after that decision, this comment is intended to delineate the marital privilege’s present invocation, scope, and limitations, and to suggest its future evolution.

II. Reason, Experience and the Peculiarly Confidential Relations of Husband and Wife

A. Benson, Funk, and Wolfe

The present day marital privilege under Rule 501 of the Federal Rules of Evidence is rooted in three Supreme Court cases: Benson v. United States,16 in 1892; Funk v. United States,17 in 1933; and Wolfe v. United States,18 in 1934.

“[In the light of general authority and sound reason,”19 the Supreme Court in Benson reexamined the long-standing common law rule of disqualification for interest20 which was the basis of declaring spouses incompetent to testify in matters affecting each other:

[S]teadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed, till now it is generally, though perhaps not universally, true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence.21

16. 146 U.S. 325 (1892).
17. 290 U.S. 371 (1933).
18. 291 U.S. 7 (1934).
21. Benson, 146 U.S. at 337. The Supreme Court affirmed defendant Benson’s conviction for murder. He had been tried in federal court because the murder was committed on a federal reservation.
On the basis of this reexamination, the Court held, contrary to ancient practice, that the testimony of a codefendant was competent, but that a defendant's wife "was not a competent witness for any purpose whatever against her husband, even though she might be willing to testify." The Court's language here suggests the traditional rationale of incompetence, but the Court's action in the case foreshadows the development of a marital privilege rather than a rule of disqualification. It also foreshadows subsequent holdings which would limit that privilege's application. The Court refused to reverse the defendant's conviction, even though his wife testified to the contents of confidential letters from defendant to her, because the defendant waived his right to object to her testimony by not doing so at the time.

The next significant step in the definition of the marital privilege was taken by the Supreme Court in Funk v. United States in 1933, where the Court, citing Benson among other cases, held that the wife of a defendant in a criminal trial is competent to testify on his behalf. Citing Funk the next year in Wolfe v. United States, the Court used the phrase since embedded in the Federal Rules governing the marital privilege: the "rules governing the competence of witnesses . . . are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience." The Court went on to provide a privilege protecting marital confidences which was to be differentiated from a continuing right of either spouse to exclude the testimony of the other:

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

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22. Id. at 327.

23. Id. at 332-33. The Court noted that defendant Benson's counsel in fact had suggested the letters' mode of admission, and found that counsel's objection by motion to strike "long after its admission . . . was too late." Id. at 332.

24. Funk, 290 U.S. at 381. The Supreme Court reversed a conviction for conspiracy to violate prohibition laws because the defendant's wife had been barred from testifying on his behalf. Id. at 386-87. In so doing, the Court noted that Benson "reject[ed] the notion . . . that the courts . . . are still chained to the ancient formulae and are powerless to declare and enforce modifications deemed to have been wrought in the common law itself by force of these changed conditions." Id. at 379.

25. Wolfe, 291 U.S. at 12 (citing Funk, 290 U.S. 371 (1933)). See infra notes 68, 80-82 and accompanying text. In Wolfe, the Court held that the contents of a letter from the defendant husband to his wife, dictated to a stenographer, could be testified to by the stenographer in a criminal prosecution. The marital privilege was held not to exclude testimony of a third person with whose participation the communication was made. Wolfe, 291 U.S. at 15.

26. Id. at 14 (citations omitted). The Court noted that privately-made communications between spouses generally are assumed to have been intended to be confidential,
The Court made it clear that it was Benson's peculiarly confidential relations that were privileged. Excluded from its protection were communications made in the presence of third parties, even those communications made "in the presence of their children . . . ."27

For forty-five years subsequent to Funk and Wolfle, the marital privilege evolved as two separate and distinct privileges. Although the Court in Wolfle referred to two privileges—a privilege for confidential communications, and a privilege, vested in either spouse, to exclude adverse spousal testimony—only the evolution of the confidential marital communications exclusion was grounded consistently in the rationale of privilege. The exclusion of confidential marital communications was limited to those instances where the peculiarly confidential relations of husband and wife clearly provided the context, with the power to waive the privilege residing with the maker of the communication. The exclusion of adverse testimony continued to be grounded, albeit not exclusively, in the rationale of spousal incompetence. As might be expected, the divergent grounds resulted in divergent definitions of the marital privilege, and in conflict within the evolution of the exclusion of adverse spousal testimony.

In the language of deconstruction, the phrase provided by the Supreme Court in Benson, the "peculiarly confidential relations" of husband and wife, is a double-edged phrase that both articulates the traditional ground of incompetence, and opens a new ground of privileged confidentiality.28 The privilege to exclude the adverse spousal testimony continued to be based, until Trammel v. United States, in the common law doctrine of incompetence, a cultural construct disapproved in nearly every case by courts which nonetheless approved, however uneasily, the exclusion of adverse spousal testimony. In contrast, the privilege for confidential marital communications evolved relatively smoothly and consistently, based on an emergent cultural construct whose existence, if not scope, was unquestioned.

Thus, as early as 1942, "confidential revelations between husband and wife"29 were cited as an example of the right of personal privacy

and hence, privileged. However, the Court explicitly left undecided whether the privilege excludes proof of communications between them, however confidential, by a witness who is neither the husband nor the wife. Id. at 13.

27. Id. at 17. The Court emphasized that the "privilege suppresses relevant testimony and should be allowed only when it is plain that marital confidence can not otherwise reasonably be preserved." Id.

28. See supra note 8.

29. Goldman v. United States, 316 U.S. 129, 141 (1942) (Murphy, J., dissenting). Justice Murphy dissented from the Supreme Court majority's holding that the use of a
guaranteed by the fourth amendment, "[o]ne of the great boons secured to the inhabitants of this country by the Bill of Rights . . . ."30 Equally early, the confidential marital communications privilege could be waived by the communicating spouse, even over the objections of the marital partner.31 Even the grand jury was not permitted to breach the private character of marital communications.32

The courts' definition of the confidential marital communications privilege was consistent throughout the period prior to Trammel,33 and indeed has continued to be consistent up to the present. The privilege protects private marital speech or communicative acts intended by one spouse to convey a message to the other;34 communications made in confidence, neither to nor in the presence of third parties.35 The scope of the communications privilege has similarly reflected the privilege's ground in the peculiarly confidential rela-

detectaphone (an early ancestor of electronic eavesdropping) was not violative of the defendant's fourth amendment rights. In protesting the Court's approval of "the revelation of thoughts uttered within the sanctity of private quarters" he cited "the most confidential revelations between husband and wife" as an example of what the Court's decision threatened. Id.

30. Id. at 136.

31. Fraser v. United States, 145 F.2d 139 (6th Cir. 1944), cert. denied, 324 U.S. 849 (1945) (affirming liability of purchasers of non-quota cotton for penalties prescribed by the Agriculture Adjustment Act of 1938, where husband and wife, both defendants, testified to confidential communications between themselves). The court stated, "Moreover, the privilege that attaches to confidential communications between husband and wife may be waived, and the waiver belongs to the communicating spouse, the addressee of the communication not being entitled to object." Id. at 144 (citation omitted).

32. Blau v. United States, 340 U.S. 332 (1951). The Supreme Court held that a husband was privileged to refuse to disclose the whereabouts of his wife to a grand jury which had subpoenaed her as a witness in an investigation of the Communist Party. Id. at 333-34.

33. See generally Comment, supra note 5, at 216-28 (discussing "the most widely accepted" marital privilege).

34. The marital communications privilege "applies only to utterances or expressions intended to be communicative." United States v. Ferris, 719 F.2d 1405, 1408 (9th Cir. 1983) (citing United States v. Lefkowitz, 618 F.2d 1313, 1318 (9th Cir.), cert. denied, 449 U.S. 824 (1980)) (wife's testimony concerning observations of drugs in defendant's car not excluded by marital confidential communications privilege). The privilege also does not preclude compulsion of a defendant's spouse's fingerprints, United States v. Thomann, 609 F.2d 560, 564 (1st Cir. 1979), or handwriting exemplars, United States v. McKeon, 558 F. Supp. 1243, 1247 (E.D.N.Y. 1983).

35. Pereira v. United States, 347 U.S. 1, 6 (1954) (no error in admission of victim's testimony in trial of defendant who had married a wealthy widow in a scheme to defraud). The Court held that the presumption of confidentiality of marital communications is negated by the presence of a third party, and generally extends only to utterances, not to acts. Id. See supra note 25. See also Wolfe, 291 U.S. at 16-17.

See also United States v. McCown, 711 F.2d 1441, 1452-53 (9th Cir. 1983) (a wife's testimony that her defendant husband had privately instructed her to write a check not excluded by the marital confidential communications privilege). Given independent testimony that the husband gave the check to a third party to use in a criminal transaction, the court found in McCown that the circumstances indicated the husband "did not intend the instruction to his wife to write the check to be confidential." Id. at 1452.
tions of husband and wife. Marital communications which have to do with a crime against the marriage relationship or with the commission of a crime in which both spouses were participants do not fall within the protection of the privilege, because such communications, however confidential, have nothing to do with the marital relation and indeed are antithetical to it.36

B. Hawkins and its Consequences

The evolution of the adverse testimony privilege has been neither consistent nor unconflicted. The Supreme Court in Funk37 had abolished common law incompetency barring spousal testimony on behalf of a defendant spouse. However, the Funk opinion left the bar of spousal incompetency undisturbed with respect to adverse testimony. In 1958, in Hawkins v. United States, the Supreme Court reaffirmed “the phase of the common-law rule which allowed either spouse to exclude adverse testimony by the other.”38 While the decision in Hawkins ostensibly ruled on a question of privilege only,39 the Court’s reasoning grounded the “privilege” in the common law rule that husband and wife were incompetent as witnesses for or

36. See, e.g., United States v. Price, 577 F.2d 1356, 1364-65 (9th Cir. 1978), cert. denied, 439 U.S. 1068 (1979) (where husband and wife are engaged in criminal conspiracy to transport women interstate for purposes of prostitution, the statement of either made in furtherance of the crime may be admitted against the other); United States v. Mendoza, 574 F.2d 1373, 1380 (5th Cir.), cert. denied, 439 U.S. 988 (1978) (otherwise confidential revelations “having to do with the commission of a crime and not with the privacy of the marriage itself do not fall within the privilege’s protection.”); United States v. Kahn, 471 F.2d 191, 194 (7th Cir. 1972), cert. denied, 411 U.S. 986 (1973), rev’d on other grounds, 415 U.S. 143 (1974) (“If the intercepted communications [between husband and wife] had to do with the commission of a crime and not with the privacy of the Kahn marriage, . . . ‘even the most expansive of the marriage privileges should not prevent testimony’”)(quoting Note, Future Crime or Tort Exception to Communications Privilege, 77 HARV. L. REV. 730, 734 (1964)).

37. See supra notes 20-21, 24 and accompanying text.

38. 358 U.S. 74, 76 (1958). In Hawkins, the Supreme Court reversed the conviction of the defendant for violations of the Mann Act in transporting a woman interstate for purposes of prostitution, because of the trial court’s admission of the wife’s ostensibly voluntary testimony over the defendant’s objection. The witness-spouse was not the victim of the crime within the statutory definition of the Mann Act. Compare infra notes 47-49 and accompanying text.

It is the right of the party spouse to invoke the “privilege” that exposes its grounding in incompetency, rather than privilege. At common law, the rule of incompetency required the party to object to the introduction of evidence. MCCORMICK, supra note 5, at § 66.

39. Wyatt v. United States, 362 U.S. 525, 528 n.4 (1960) (“Funk v. United States . . . abolished, for the federal courts, the disqualification or incompetence of the spouse as a witness, thus establishing the admissibility of his or her testimony, and leaving the question [for Hawkins] one of privilege only”). But see supra note 38.
against each other, even if either wished to testify. The “privilege” was couched in the language of the common law disqualification:

Over the years the rule has evolved from the common law absolute disqualification to a rule which bars the testimony of one spouse against the other unless both consent . . . . [W]e are unable to subscribe to the idea that an exclusionary rule based on the persistent instincts of several centuries should now be abandoned.

The Court recognized that disqualification, the original reason for barring favorable testimony of spouses, had long been abolished, but insisted on a “basic reason” for the retention of the rule barring adverse spousal testimony as “necessary to foster family peace” and “family harmony.”

The government’s argument in Hawkins, that voluntary testimony is a strong indication that the marriage no longer exists, was far closer to the Court’s hallmark formulation in Benson which grounded the marital privilege in the peculiarly confidential relations of husband and wife. Justice Stewart in his concurring opinion provided the better rationale for the Hawkins decision, not only restating succinctly the government’s proposal for a marital privilege, but also forecasting with remarkable accuracy the chief problem that definition of the marital privilege would present to the courts more than twenty years later.

Justice Stewart began by identifying the rule against adverse spousal testimony as “the product of a conceptualism long ago discarded, . . . universally criticized by scholars, and . . . qualified or abandoned in many jurisdictions . . . .”:

Surely “reason and experience” require that we do more than indulge in mere assumptions, perhaps naive assumptions, as to the importance of this ancient rule to the interests of domestic tranquillity.

In the present case, however, the Government . . . ask[s] only to hold that the privilege is that of the witness and not the accused. Under such a rule the

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40. Hawkins, 358 U.S. at 75.
41. Id. at 78-79.
42. Id. at 77. The Court continued:

[A] belief [that such a policy was necessary] has never been unreasonable and is not now. Moreover, it is difficult to see how family harmony is less disturbed by a wife’s voluntary testimony against her husband than by her compelled testimony. In truth, it seems probable that much more bitterness would be engendered by voluntary testimony than by that which is compelled. But the Government argues that the fact a husband or wife testifies against the other voluntarily is strong indication that the marriage is already gone. Doubtless this is often true. But not all marital flare-ups in which one spouse wants to hurt the other are permanent.

Id.

43. See supra note 21 and accompanying text. In Hawkins, the government asked that the Court “modify the rule so that while a husband or wife will not be compelled to testify against the other, either will be free to do so voluntarily.” Hawkins, 358 U.S. at 77. The government argued that the common law development could be explained and its policies fully vindicated by recognizing a privilege of the witness, rather than an outmoded bar declaring the witness incompetent. See Wyatt, 362 U.S. at 528-29 (discussion of the government’s argument in the Hawkins brief).
defendant in a criminal case could not prevent his wife from testifying against him, but she could not be compelled to do so.\textsuperscript{44}

The Justice concurred in the Court's decision, although he noted that the facts of the case suggested that no viable marriage relationship existed. The reason for his concurrence was that the facts also suggested that the testimony in question was scarcely voluntary, raising the further question as to a rule of voluntariness, which would be "difficult to administer and easy to abuse."\textsuperscript{45}

The Supreme Court's definition in \textit{Hawkins} of an adverse spousal testimony privilege, or more correctly, a continuing bar to adverse spousal testimony, only exacerbated the universal criticism and conflicting applications to which Justice Stewart referred in his concurring opinion. Justice Stewart's concurring opinion is an exemplary deconstructive analysis of the Court's definition of this aspect of the marital privilege. In effect, he states that the Court's reassertion of a "conceptualism long ago discarded" rendered its conclusion problematic.\textsuperscript{46}

The troubled consequences of \textit{Hawkins'} problematic privilege were not long in emerging in the lower courts' attempts at defining the marital privilege.

The reluctance of the courts to apply a testimonial privilege whose antecedents had been so universally disapproved resulted in a proliferation of restrictions on the invocation of the adverse spousal testimony bar. Within two years of \textit{Hawkins}, the Supreme Court held, in \textit{Wyatt v. United States},\textsuperscript{47} not only that a defendant could be refused the general privilege of excluding his wife's testimony in a Mann Act prosecution, but also that the wife could be compelled to testify. The Court refused to allow a defendant who had committed an offense against the marriage relation itself to invoke "an interest founded on the marital relation or the desire of the law to protect it."\textsuperscript{48}

For the compulsion of the wife's testimony, the Court found a basis in "congressional judgment and policy embodied in the Mann Act."\textsuperscript{49} However, for the refusal to allow the defendant the adverse

\textsuperscript{44} \textit{Hawkins}, 358 U.S. at 81-82 (footnote omitted) (Stewart, J., concurring).
\textsuperscript{45} Id. at 82-83. See infra notes 98-115 and accompanying text.
\textsuperscript{46} Compare supra notes 9-11 and accompanying text.
\textsuperscript{47} 362 U.S. 525 (1960). In Wyatt, the Court affirmed the defendant's conviction for knowingly transporting a woman interstate for purposes of prostitution, upholding the trial court's compelled testimony of the woman, who had married the defendant subsequent to the offense and prior to the trial. Id. at 526 n.1.
\textsuperscript{48} Id. at 527. The Court based its holding on reaffirming, post-\textit{Hawkins}, a common law exception to the marital privilege long recognized in the case of certain kinds of offenses, including specifically Mann Act offenses. Id. at 526.
\textsuperscript{49} Id. at 530. The Court continued: "Applying the legislative judgment underly-
testimony bar, the Court relied not on the questionable family harmony rationale of Hawkins, but directly on the absence of the marital relation, even referring to the Government's argument in Hawkins as a justification for the holding.50

A legally valid marriage has long been recognized by the courts as a precondition for the existence of any marital privilege.51 The courts have also refused to accord the protection of the marital privilege to otherwise valid marriages that are "sham" marriages, entered into for fraudulent purposes, including the purpose of excluding spousal testimony.52 However, in the wake of Hawkins, courts held that the adverse testimony should also be admitted where the marriage, while existent, was no longer viable.53

50. Id. at 528-29. See also supra note 43 and accompanying text.

51. United States v. Snyder, 707 F.2d 139 (5th Cir. 1983) ("Testimonial privilege between husband and wife requires a valid marriage relationship. It does not include situations in which the parties were merely living together."); United States v. Lustig, 555 F.2d 737 (9th Cir.), cert. denied, 434 U.S. 926 (1977) (both adverse spousal testimony privilege and confidential marital communications privilege "depend on the existence of a valid marriage, as determined by state law. [citations omitted] Common law marriage is not valid under Alaska law."); United States v. White, 545 F.2d 1129 (8th Cir. 1976) (defendant and witness-wife not married according to the law of Arkansas, and no evidence that they had ever lived together in a state where common law marriage might be recognized); United States v. Panetta, 436 F. Supp. 114 (E.D. Pa.), aff'd, 568 F.2d 771 (3d Cir. 1977) (test whether valid marriage existed is not whether parties to allegedly valid marriage believed that they were validly married, but whether in law they were validly married).

52. Lutwak v. United States, 344 U.S. 604, 615 (1953) ("In a sham, phony, empty ceremony such as the parties went through in this case, the reason for the rule disqualifying a spouse from giving testimony disappears, and with it the rule."); United States v. Samiti, 604 F.2d 603, 604 n.1 (9th Cir. 1979) ("Marital privilege is not available when, as here, the purpose of the marriage was for the purpose of invoking the marital privilege."); United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975) (marital privilege may not be invoked where marriage of witness to defendant three days prior to trial was fraudulent, spurious, and not entered into in good faith).

53. Following Hawkins, the Eighth Circuit Court of Appeals upheld the adverse spousal testimony exclusion, refusing "to condition the privilege . . . on a judicial determination that the marriage is a happy or successful one." United States v. Lilley, 581 F.2d 182, 189 (8th Cir. 1978). In Lilley, the Eighth Circuit Court of Appeals reversed the defendant wife's conviction because her husband was allowed to testify that she, rather than he, had forged the instrument at issue in the trial. The court reversed despite the fact that the defendant referred to her husband as her ex-husband, and disclaimed any continuing marital relationship, presumably on the basis that the legality of their marriage was undisputed. Id. at 185 n.1. But see United States v. Brown, 605 F.2d 389 (8th Cir. 1979), where the Eighth Circuit's holding is consistent with the more common practice:

The higher-than-truth value served by the privilege before us is the protection of the marital bond. Where, as here, [the witness] was with her husband for two weeks and had not seen him for the entire eight months between his leaving her and the date of the trial, it is difficult to visualize how preservation of that value would have required [her] total exclusion . . . from the witness stand.

Id. at 396.
The decisions admitting adverse spousal testimony were grounded most often in findings that the substantive marital relationship which would justify exclusion did not exist. In United States v. Cameron, the court admitted adverse spousal testimony, stating that reason and experience indicated that traditional policy reasons were nonexistent in the circumstances of the case. Although the continuation of an exclusionary rule in Hawkins was duly noted in the decision, the court found that in spite of the legal existence of the marriage, it had expired as a social fact. Cameron is characteristic of other court decisions that begin a privilege analysis by referring to Hawkins, and a privilege that "is what remains of the old common law rule that a spouse was incompetent as a witness for or against the other spouse based on the legal fiction that husband and wife were one person." The courts then state that the adverse testimony is voluntary, and no otherwise confidential communications are involved. Citing these factual circumstances, the courts base their refusal to exclude adverse spousal testimony directly and explicitly on the absence of the marital relationship which alone would justify its exclusion.

54. 556 F.2d 752 (5th Cir. 1977). In Cameron, the defendant's wife had voluntarily testified against her husband in his trial for interstate transportation of a stolen automobile. On appeal, the court found that the evidence supported a finding that the marriage was no longer viable, and its members had little hope or desire for reconciliation:

There was no residence at which both spouses lived; there was a great disparity between the amount of time that the couple cohabited and the time that one or the other chose not to live together; the husband had a more permanent living arrangement with another partner than with his spouse and, indeed, fathered a child with that person. All these factors cumulatively signify a marriage that was moribund. Id. at 756.

55. The court in Cameron cited the Supreme Court's opinion in Hawkins to support its defiance of the Court's holding in that case. It stated that the Supreme Court's decision was not intended to foreclose further changes in the rule dictated by reason and experience, but rather placed on the courts the responsibility of examining the policies behind the federal common law privileges so as to alter or amend them. Id. at 755-56.

56. Van Drunen, 501 F.2d at 1396.


58. See, e.g., Cameron, 556 F.2d at 756; Lustig, 555 F.2d at 748; Benford, 457 F. Supp. at 598. The Supreme Court's decision to compel adverse spousal testimony in Wyatt v. United States, 362 U.S. 525 (1960), was based on statutory grounds unique to the Mann Act. See supra note 48 and accompanying text.

59. See, e.g., Cameron, 556 F.2d at 756; Benford, 457 F. Supp. at 598 ("The testimony of a willing wife who has filed the original complaint against her husband is hardly likely to do more to upset a marital relationship than already has been done.").
Other means by which courts subsequent to \textit{Hawkins} found adverse spousal testimony admissible also were based on the concept of the privilege accorded the confidential marital relationship. Drawing an analogy to the exceptions to the confidential marital communications privilege, the court in \textit{United States v. Van Drunen} limited the privilege to bar adverse spousal testimony to "those cases where it makes most sense, namely, where a spouse who is neither a victim nor a participant observes evidence of the other spouse's [sic] crime."\(^{60}\) While acknowledging that "the two marital privileges must 'be sharply distinguished,'" the court stated that the policy supporting both is the same: "The underlying reason for both privileges is to preserve the family."\(^{61}\) Using similar reasoning, the court in \textit{United States v. Allery} also refused to exclude adverse spousal testimony where the crime was an offense against a child or stepchild of the family unit.\(^{62}\) Noting that the general rule as formulated in \textit{Hawkins} was widely criticized, the court found that the offense was an offense against the family as well as society, and the voluntary adverse testimony of the defendant's spouse was admissible.\(^{63}\)

The lengths to which the courts were willing to go, despite \textit{Hawkins}, in order to follow the dictates of reason and experience and ground the marital privilege in the peculiarly confidential relations of husband and wife are illustrated in \textit{Ryan v. Commissioner}.\(^{64}\) The court not only allowed but compelled spousal testimony in \textit{Ryan}, despite an unquestionably valid and vital marriage. The court rejected \textit{Hawkins} on the grounds (unique to this case) that the family harmony needed no protection. Its decision was based on two findings: (1) the privacy interests of husband and wife were not at stake, since

\(^{60}\) United States v. Van Drunen, 501 F.2d 1393, 1397 (7th Cir.), cert. denied, 419 U.S. 1091 (1974). The court in \textit{Van Drunen} affirmed the conviction of the defendant for illegal transportation of aliens, and refused to bar the testimony of the defendant's wife, whose transportation was the subject of one count of the indictment. Acknowledging that "\textit{Hawkins} . . . is arguably a barrier to the result reached today," the Seventh Circuit court nonetheless stated: "We do not view \textit{Hawkins} as controlling . . . we decline to read the \textit{Hawkins} opinion as foreclosing the possibility of other exceptions not discussed therein." \textit{Id.} at 1396-97. Compare supra note 36 and accompanying text.

\(^{61}\) \textit{Van Drunen}, 501 F.2d at 1396.

\(^{62}\) 526 F.2d 1362 (8th Cir. 1975). The court in \textit{Allen}y affirmed the defendant's conviction for attempted rape of his daughter, finding that the trial court did not err in permitting his wife's testimony concerning his sexual misconduct towards their children.

\(^{63}\) \textit{Id.} at 1365-66.

\(^{64}\) 568 F.2d 531 (7th Cir. 1977). In \textit{Ryan}, culminating eight years of litigation concerning federal income tax assessments, husband and wife appealed a contempt order imposed for their refusal to answer interrogatories propounded by the Commissioner of Internal Revenue. The court affirmed the contempt judgment, stating that the \textit{Hawkins} rationale for the privilege against adverse spousal testimony was not at stake: "The Ryans, who were married for about 40 years, realistically do not contend that recognition of the marital privilege would have been necessary to protect their marriage." \textit{Id.} at 543.
no information was sought relating to intimate marital communications; and (2) the grant of use immunity to both spouses precluded any actual adverse use in subsequent criminal proceedings.⁶⁵

Ryan recalls the analysis of Justice Stewart, concurring in Hawkins and forecasting the future of the marital privilege far more effectively than did the majority in that case.⁶⁶ Insofar as the court's holding in Ryan is similar to Justice Stewart's concurrence, the logic of the court is straightforward and consistent with the rulings of the other circuits. The court's findings in Ryan are precisely those on which the holdings of post-Trammel courts are based. The confidential marital relationship is respected. The grant of immunity to both spouses, rather than merely to one as against the other, effectively resolves the problem of adverse testimony by eliminating the possibility of testimonial incrimination altogether. On the other hand, the court's tortured distinguishing of the Hawkins holding and its osten-
sible ground in family harmony epitomizes the difficulty that the decision caused the federal courts in their evolving definition of the marital privilege, a difficulty that would persist until the Supreme Court reconsidered and overruled Hawkins in United States v. Trammel in 1980.

III. THE DECONSTRUCTION OF THE MARITAL PRIVILEGE

A. The Federal Rules

The evolution of the federal rules, under whose authority the marital privilege in turn evolved, does not constitute a changing basis for the marital privilege. Rather, it is yet another reflection of the evolution of the marital privilege since Benson. An examination of the changes in the governing statutory authority—from Rule 26 of the Federal Rules of Criminal Procedure, through the Proposed Draft Rules, up to the enactment of Rule 501 of the Federal Rules of Evidence—reveals the impact of the concept of the peculiarly confidential relations of husband and wife, in the light of reason and experience.

The first modern codification of privilege in the federal courts, Rule 26 of the Federal Rules of Criminal Procedure, drew its formu-

⁶⁵. Id. The grant of immunity to both spouses in Ryan anticipated the present and proposed uses of immunity in connection with the compulsion of spousal testimony, rendered thereby no longer adverse. See infra notes 161-67 and accompanying text.
⁶⁶. See supra notes 43-44 and accompanying text.
lation from two landmark cases dealing with the marital privilege, *Funk* and *Wolfle*:

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 principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Rule 26, approved by Congress in 1946 after several years of preparation by an advisory committee under the supervision of the Supreme Court, looks both backward and forward. The rule governs both competency and privileges of witnesses, reflecting the persistence of the ancient doctrine of disqualification that was to haunt the Supreme Court in *Hawkins* and the federal courts' subsequent efforts to deal with that decision. The rule also embodies the right and duty of the courts to question that ancient doctrine "in the light of reason and experience." It is an invitation, even a mandate, to undertake deconstructive analysis, as epitomized in Justice Stewart's concurring opinion in *Hawkins*.

As such, Rule 26, viewed with the evolution of the marital privilege as both its phenomenological ground and its best exemplar, embodies the principle of deconstructive analysis as a philosophical underpinning of modern American jurisprudence equal and opposite to stare decisis, the forceful principle of binding and persuasive precedent.

The power of reason and experience, and the difficult precedent of *Hawkins*, collided in the cases subsequent to *Hawkins* ruling on the marital privilege. The two principles came into conflict again in the controversy that ensued upon the next stage in the evolution of the federal rules governing the marital privilege, the Proposed Draft Rules of Evidence, in 1969 and 1971.

Rule 505 of the Proposed Draft Rules specifically provided for a "Husband-Wife Privilege . . . . A person has a privilege to prevent any testimony of his spouse from being admitted in evidence in a

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67. See supra notes 24-27 and accompanying text. For an extensive discussion of the evolution of the Federal Rules of Evidence, see Haney, supra note 5, at 112-17.

68. The Advisory Committee notes to Rule 26 acknowledge its origin in *Funk* and *Wolfle*:

This rule contemplates the development of a uniform body of rules of evidence, to be applicable in trials of criminal cases in the Federal courts. It is based on *Funk* . . . . and *Wolfle* . . . . The rule does not fetter the applicable law of evidence to that originally existing at common law. It is contemplated that the law may be modified and adjusted from time to time by judicial decision . . . .


69. See supra notes 44-46 and accompanying text. See also supra notes 8-9 and accompanying text.

criminal proceeding against him.” 71 The Proposed Draft Rule recognized a “privilege” technically belonging to the spouse against whom the testimony was to be offered, although in practice the “presumed authority” of the testifying spouse to claim the privilege on the other’s behalf meant that either spouse could bar adverse spousal testimony. The fact that the right to bar testimony was vested by the Advisory Committee in accordance with the “usual doctrine . . . of allowing the injured party to claim or waive privilege” 72 reveals that the rule in fact continues to be one based on incompetence rather than privilege. 73 Citing Hawkins, the Advisory Committee claimed this was “to represent the one aspect of the marital privilege the continuation of which is warranted.” 74

The rule recognized no privilege for confidential marital communications. The rationale of the Committee for the surprising omission of the heretofore consistently recognized, widely accepted marital

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71. 51 F.R.D. at 369. In full, Proposed Draft Rule 505 provides as follows:

(a) General Rule of Privilege. A person has a privilege to prevent any testimony of his spouse from being admitted in evidence in a criminal proceeding against him.

(b) Who May Claim the Privilege. The privilege may be claimed by the person or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of evidence to the contrary.

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

Id. Proposed Rule 505(c)(3) preserved the Mann Act exception to the marital privilege. See supra notes 47-49 and accompanying text.

72. Id. at 370.

73. See supra note 38.

74. Proposed Draft Rules, 51 F.R.D. at 370. Although the Advisory Committee cited Hawkins for its continuation of the bar on adverse spousal testimony, the Committee specifically rejected Hawkins in its comment to Rule 505(c)(3):

(3) The third exception continues and expands established Congressional policy. In prosecutions for importing aliens for immoral purposes, Congress has specifically denied the accused any privilege not to have his spouse testify against him. 18 U.S.C. § 1328. No provision of this nature is included in the Mann Act, and in Hawkins v. United States, 358 U.S. 74, 79 S. Ct. 136, 3 L. Ed. 2d 125 (1958), the conclusion was reached that the common law privilege continued. Consistency requires similar results in the two situations. The rule adopts the Congressional approach, as based upon a more realistic appraisal of the marriage relationship in cases of this kind, in preference to the specific result in Hawkins.

Id. at 371.
communication privilege reveals the blindness of the Committee to the most important ground for a marital privilege, the confidential relationship of husband and wife:

The traditional justifications for privileges not to testify against a spouse and not to be testified against by one's spouse have been the prevention of marital dissension and the repugnancy of requiring a person to condemn or be condemned by his spouse. These considerations bear no relevancy to marital communications. Nor can it be assumed that marital conduct will be affected by a privilege for confidential communications of whose existence the parties in all likelihood are unaware.\(^75\)

As might be expected from the opinions of the cases subsequent to \textit{Hawkins} in the two decades prior to the proposal of the rules, there was an immediate and virtually unanimous outpouring of criticism of Rule 505 and the Advisory Committee's comments.\(^76\) In this outpouring of support for the preservation of the husband-wife privilege, as the matter was specifically phrased, the right of privacy emerged as both the important ground for the privilege, and as the chief beneficiary of the preservation of the privilege. The concern, noted by one commentator in words that are a modern formulation of Benson's peculiarly confidential relations of husband and wife, is not the exclusion of testimony of doubtful veracity (which was the rationale of incompetence), but the protection of intimate confidential relations:

This matter strikes so close to the heart of privacy that society ought carefully to evaluate, in specific cases, the precise countervailing social demands before that right is sacrificed. The confidential communication . . . is part and parcel of the right of privacy . . . . [T]estimonial privileges serve as important protections of the right of privacy.\(^77\)

The criticism of the Committee's Proposed Rules recognized the essential link between the marital privilege and the way in which it had evolved in the light of reason and experience. Cases subsequent to \textit{Hawkins} had found relief from that case's oppressive ruling in the more permissive language of Rule 26, which the rigid Rule 505 was intended to replace. The need for careful evaluation in specific cases, that the commentator quoted above emphasized, led to further resistance to the Proposed Draft Rules. The concern was that rigid codification would shut off judicial evolution of testamentary privileges and the possibility of judicially-fostered growth and change.\(^78\)

\(^{75}\) Id. at 370.

\(^{76}\) Haney, \textit{supra} note 5, at 116 (“The immediate uproar that erupted after the publication of the Supreme Court's version had a profound effect on Congress. Most of the criticism was directed at Article V and its attempt to codify the law of privilege.”).


\(^{78}\) Krattenmaker, \textit{supra} note 77, at 83. Krattenmaker goes on to specifically criticize the Advisory Committee’s assertion that the parties to a marriage are unaware of
In any event, Congress reacted to the criticism of the Proposed Draft Rules. Rule 501 of the Federal Rules of Evidence as finally enacted was more the product of the Proposed Rules’ critics than of the Advisory Committee:

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.

Both Congress and the courts clearly understood Rule 501 of the Federal Rules of Evidence to follow on Rule 26 of the Federal Rules of Criminal Procedure, which it supplanted. In enacting the rule, Congress recognized that “husband, wife, or any other of the enumerated privileges contained in the Supreme Court rules [the Proposed Draft Rules]... based on a confidential relationship... should be determined on a case by case basis.” Citing this passage from the enacting legislation, the Eighth Circuit Court of Appeals in United States v. Allery held “that this Court, as well as other federal courts, has the right and the responsibility to examine the policies behind the federal common law privileges and to alter or amend them when ‘reason and experience’ so demand.”

By reaffirming the grounds of the marital privilege in the principles of the case law and their further evolution in the light of reason and experience, Rule 501 represented a significant step in the deconstruction of the marital privilege. Rule 501 itself reaffirmed the principle of deconstructive analysis. The criticisms which led to its final formulation both explicitly eliminated the old cultural construct of 

(and therefore unconcerned with) a right to confidential relations, to “argue that a poll be taken, and dare the Committee to wager on the outcome.” Id. at 91.


80. Fed. R. Evid. 501 (emphasis added). Compare supra note 68 and accompanying text. Rule 501 continues, “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.” Id.


82. Id. Discussing the evolution of the marital privilege, the court in Allery indicated that the position of Rule 26 “was reiterated by Congress in the enactment of Rule 501 of the Federal Rules of Evidence and in the Committee Notes to Rule 501.” Id. at 1364.
incompetence from the language of the rule and grounded the marital privilege it governed in a nascent cultural construct, the right to privacy.

B. Trammel v. United States

In *Trammel v. United States*, the marital privilege was freed from the last relic of the doctrine of incompetency, the right of the spouse against whom adverse spousal testimony was offered to bar that testimony. The Supreme Court rejected the *Hawkins* rule, holding at long last that the witness-spouse alone has the privilege to refuse to testify adversely to spousal interests. In so doing, the Court found that “the ancient foundations for so sweeping a privilege [the bar on adverse spousal testimony] . . . have long since disappeared . . . . The contemporary justification for affording an accused such a privilege is unpersuasive.” Accepting the government arguments it had rejected in *Hawkins*, the Court observed that “[w]hen one spouse is willing to testify against the other in a criminal proceeding . . . there is probably little in the way of marital harmony for the privilege to preserve,” thus the rule is unlikely to foster family peace.

The Court rejected the *Hawkins* rationale in favor of the rationale in which the confidential marital communications privilege had long been grounded, the protection of “information privately disclosed between husband and wife in the confidence of the marital relationship—once described by this Court as ‘the best solace of human existence.’” The Court also relied on Rule 501, and Congress’ acknowledgement of the federal courts’ authority to continue the evolution of the marital privilege “in the light of reason and experi-

83. 445 U.S. 40. In trial on federal drug charges, defendant Trammel attempted to bar his wife from testifying as a government witness under a grant of immunity. The trial court ruled that confidential communications between the defendant and his wife were privileged, and therefore inadmissible, but that the wife might testify to any act she observed before or during the marriage, and to any non-confidential communication. The Tenth Circuit Court of Appeals concluded that *Hawkins* did not prohibit voluntary testimony of an immunized, co-conspirator spouse. The Supreme Court affirmed. *Id.* at 43.

84. *Id.* at 52.

85. *See supra* note 43 and accompanying text.

86. *Trammel*, 445 U.S. at 52. The Court continued:

Indeed, there is reason to believe that vesting the privilege in the accused could actually undermine the marital relationship. For example, in a case such as this, the Government is unlikely to offer a wife immunity and lenient treatment if it knows that her husband can prevent her from giving adverse testimony . . . . It hardly seems conducive to the preservation of the marital relation to place a wife in jeopardy solely by virtue of her husband’s control over her testimony.

*Id.* at 52-53.

87. *Id.* at 51.
ence," as well as the "trend in state law toward divesting the accused of the privilege to bar adverse spousal testimony." Commentators evaluating the Supreme Court's decision in *Trammel* perceived its impact on the marital privilege in terms of continued erosion of the privilege, and its devolution into two strictly limited, much eroded and mutually exclusive privileges. When the Advisory Committee had earlier attempted to eliminate the privilege for confidential marital communications, the privilege was denigrated as a relatively weaker companion privilege to professional confidential privileges of attorneys, physicians and priests. But the Court in *Trammel* criticized not the confidential marital communications privilege, but the *Hawkins* bar on adverse spousal testimony as sweeping too broadly. The Court explicitly contrasted the *Hawkins* bar to the privileges accorded the private communications of priests, attorneys and physicians in their professional capacities, and implicitly to a re-

88. *Id.* at 47. The Court stated:

The general mandate of Rule 501 was substituted by the Congress for a set of privilege rules drafted by the Judicial Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States and by this Court. That proposal defined nine specific privileges, including a husband-wife privilege which would have codified the *Hawkins* rule and eliminated the privilege for confidential marital communications. See proposed Fed. Rule Evid. 505. In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis."

89. *Id.* at 49-50.

90. See, e.g., United States v. Neal, 743 F.2d 1441, 1444 (10th Cir. 1984) ("as a practical matter the United States Supreme Court . . . may have intended to eliminate the communication privilege altogether"); Jones, 683 F.2d at 818 (4th Cir. 1982) (*Trammel* operates "to narrow, not expand, the scope of the marital testimonial privilege"); *In re Grand Jury Proceedings*, 664 F.2d 423, 429-30 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) ("disfavor into which the marital privilege has fallen, largely because of the rejection of the archaic notion of the unity of husband and wife"); Haney, *supra* note 5, at 146-47, 154-62 (discussing "the historical antipathy that Federal courts have displayed against this exclusionary device . . . .") *id.* at 146; *Trammel* "may even place the witness spouse at a greater disadvantage than he or she would have incurred under the *Hawkins* rule." *Id.* at 154; Purdy, *supra* note 5, at 309 ("In recent years the privilege has been viewed with greater skepticism"). Comment, *The Spousal Testimony Privilege*, *supra* note 20, at 369 (the spousal testimonial privilege "will become a mere charade"); *Note*, *supra* note 5, at 892 ("The development of the rules of evidence has resulted in waning support for these privileges . . . .").

91. Proposed Draft Rules, 51 F.R.D. at 370. Justifying the elimination of any privilege for confidential marital communications, the Advisory Committee noted, "The other communication privileges, by way of contrast, have as one party a professional person . . . the relationships from which those privileges arise are essentially and almost exclusively verbal in nature, quite unlike marriage." *Id.*
affirmed confidential marital communications privilege. In *Trammel*, the confidential marital communications privilege is linked, at least by juxtaposition and similar “imperative need for confidence and trust,” to the professional privileges, in contrast to the disapproved adverse spousal testimony bar.

The views of the commentators were well-reasoned in terms of traditional rhetorical analysis, looking to the logically and temporally prior rhetorical grounds of the marital privilege now disapproved in *Trammel*. One commentator goes so far as to assert that, with the repudiation of the *Hawkins* reasoning, the *Trammel* opinion is “a de novo analysis by the Supreme Court and the Court’s rationale must be considered independently of *Hawkins*.” While it may be true that the Court’s rationale in *Trammel* is independent of the *Hawkins* majority opinion, it is scarcely de novo analysis. It is in fact an adoption by the Court’s majority of the deconstructive analysis contained in Justice Stewart’s concurring opinion in *Hawkins*. Moreover, as noted earlier in this comment, the process of deconstruction is not the process of destruction. The displacement of the rhetorical grounds of the marital privilege does not invalidate the marital privi-

92. *Trammel*, 445 U.S. at 51. The Court stated:

No other testimonial privilege sweeps so broadly. The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust . . . . The *Hawkins* rule stands in marked contrast to these three privileges. Its protection is not limited to confidential communications; rather it permits an accused to exclude all adverse spousal testimony.

Id.

93. Id. The Court emphasized, “It is essential to remember that the *Hawkins* privilege is not needed to protect information privately disclosed between husband and wife in the confidence of marital relationship—once described by this Court as ‘the best solace of human existence.’”

*Id.*


95. See supra notes 43-45 and accompanying text. As he had in *Hawkins*, Justice Stewart contributed a separate concurring opinion in *Trammel*, comparing the “all but unanimous opinion” of *Hawkins* to the “all but unanimous opinion” of *Trammel*. Each opinion, of course, was unanimous but for the concurring opinion of Justice Stewart, who did not let the opportunity pass for continuing his deconstructive analysis:

The fact of the matter is that the Court in this case simply accepts the very same arguments that the Court rejected when the Government first made them in the *Hawkins* case in 1958. I thought those arguments were valid then, and I think so now.

The Court is correct when it says that “[t]he ancient foundations for so sweeping a privilege have long since disappeared.” *Ante*, at 52. 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.

*Trammel*, 445 U.S. at 54 (Stewart, J., concurring) (footnotes omitted).

96. See supra note 8 and accompanying text.
lege. The opinion in Trammel, referring as it does to the “need to protect the confidence of the marital relationship,”97 is rooted firmly in the phenomenally prior grounding of the marital privilege, characterized since Benson as the substantive confidential relation of husband and wife. The Court's disapproval of the old cultural construct did not destroy the marital privilege, but in fact freed it from a burden of argument and rationalization that had for too long rendered it problematic.

IV. THE MARITAL PRIVILEGE SINCE TRAMMEL

A. The Question of Voluntariness

With the Supreme Court's decision in Trammel, the admission of voluntary adverse spousal testimony became the formal rule rationalizing the emergent practice of the courts that the Court in fact had acknowledged in that decision.98 The most immediate consequence of Trammel was the shift of judicial focus to the concern articulated in Justice Stewart's prescient concurring opinion in Hawkins.99 The Justice had concurred in the majority's refusal to create a testimonial privilege vested in the witness spouse only, eliminating the accused's right to bar adverse testimony, because Hawkins was "hardly the case in which to advance it."100 The proposed privilege would have applied only to prevent the compulsion of adverse spousal testimony:

These circumstances [of Hawkins] are hardly consistent with the theory that her testimony was voluntary. Moreover, they serve to emphasize that the rule advanced by the Government would not, as it argues, create "a standard which has the great advantage of simplicity." On the contrary, such a rule would be difficult to administer and easy to abuse. Seldom would it be a simple matter to determine whether the spouse’s testimony were really voluntary, since there would often be ways to compel such testimony more subtle than the simple issuance of a subpoena, but just as cogent.101

In the event, the question of voluntariness has been resolved with little difficulty or conflict by the courts. The Supreme Court in Trammel, establishing the privilege rejected in Hawkins, disposed of

98. See supra notes 47-66 and accompanying text.
99. See supra notes 44-45 and accompanying text.
100. Hawkins, 358 U.S. at 82. Justice Stewart stated:

Under such a rule the defendant in a criminal case could not prevent his wife from testifying against him, but she could not be compelled to do so . . . . A supplemental record shows that before [defendant's wife] testified, she had been imprisoned as a material witness and released under $3,000 bond conditioned upon her appearance in court as a witness for the United States.

Id. at 82-83.
101. Id. at 83.
voluntariness concerns with one sentence: "When one spouse is willing to testify against the other in a criminal prosecution—whatever the motivation—their relationship is almost certainly in disrepair. . . ."102 The analysis of voluntariness that follows from this statement is clear. Whether adverse spousal testimony is voluntary is a relevant subject of inquiry only where the confidential relations of husband and wife substantively exist; where the substantive marital relationship exists, it is protected by the marital privilege. The federal courts had in practice abrogated the Hawkins bar on adverse spousal testimony while continuing to protect marital confidentiality in the years prior to Trammel by just such reasoning. Under these rulings, voluntary adverse spousal testimony was admitted where no otherwise confidential communications were involved because the marriage, however valid, did not exist as a "social fact."103

This allowance of voluntary adverse spousal testimony in the absence of a substantive marital relationship is the practice in the federal courts today. The analyses of the Tenth Circuit Court of Appeals104 in United States v. Neal105 and United States v. Kapnison,106 both decided in September, 1984, are representative. In Neal, the defendant appealed from a conviction for murder in the course of a bank robbery, challenging the admissibility of his wife's testimony as an immunized government witness. Citing Trammel, the court found that Neal's wife had voluntarily elected to testify after being granted immunity from prosecution as an accessory after the fact to her husband's offense.107 Marcia Neal had filed for divorce and was living with another man at the time of the trial. The court summarized a sequence of events that made it clear that the grant of immunity and decision to testify had followed rather than provoked the breakdown of the marital relationship.108 The circum-

102. Trammel, 445 U.S. at 52 (emphasis added). The Court suggested further that the rejected bar on adverse spousal testimony might work an equal if opposite injustice by denying a spouse the opportunity to bargain for lenient treatment or immunity. See supra note 86.

103. United States v. Cameron, 556 F.2d 752, 756 (5th Cir. 1977). See supra notes 56-59 and accompanying text.

104. It was a Tenth Circuit Court of Appeals decision, United States v. Trammel, 583 F.2d 1166 (10th Cir. 1978), that the Supreme Court affirmed, thereby establishing the present marital privilege in Trammel v. United States, 445 U.S. 40 (1980).

105. 743 F.2d 1441 (10th Cir. 1984).

106. 743 F.2d 1450 (10th Cir. 1984).

107. Neal, 743 F.2d at 1444-45.

108. The court noted that "Marcia [Mrs. Neal] testified on cross-examination that she lived with Neal for eight months after the robbery without revealing anything about the robbery or the money to anyone." Id. at 1443. Quoting from Mrs. Neal's trial testimony:

Q. And, Mrs. Neal, what was the relationship between yourself and Mr. Dietz at that time?

A. Well, it started out as a working companion. He worked with me. He shared a shift with me, and we became very close, and I confided in him quite
stances of Neal replicate the factual pattern of Trammel insofar as the witness-spouse in that case also testified under a grant of immunity. More clearly than in Trammel, the court’s recitation of the facts in Neal emphasizes that, whatever the legal status of the Neal’s marriage, their marital relationship was substantively nonexistent. Pursuant to this analysis, the court held that testimony of the immunized witness-spouse was voluntary adverse testimony, admissible under Trammel.

The question of voluntariness does not arise exclusively in the context of a grant of immunity to a witness-spouse. In United States v. Kapnison, the defendant, convicted in a loan kick-back scheme, contended that government agents contacted his wife while he was the target of a grand jury investigation and “coerced her into becoming an agent for the government.” The appellate court affirmed the district court’s finding that the defendant’s wife had testified voluntarily. The court based its affirmation directly on “significant” trial

109. See supra note 83.
110. Neal, 743 F.2d at 1444-45.
111. Kapnison, 743 F.2d at 1453. The court noted Kapnison’s argument that “the conduct of the government’s agents was particularly egregious when, as here, the agents took advantage of the fact that he was involved in divorce proceedings and attempting to reconcile with his wife.” Id.
112. The relevant portion of the opinion, in full, is as follows: “There was no showing whatsoever that Natalyn Kapnison was coerced into cooperating with the United States. Mrs. Kapnison testified she cooperated with the government voluntarily. No evidence was presented to the contrary. (R., Vol. I at 289). We agree with the district court’s finding that Natalyn testified voluntarily.” Id.

In United States v. Crouthers, 689 F.2d 635 (10th Cir. 1982), the Tenth Circuit Court of Appeals approved a procedural standard for the determination that adverse spousal testimony is voluntary. Holding that a witness-spouse had properly waived her right to refuse to testify adversely to her defendant husband, the court cited the following factors: the trial court held a hearing and informed her prior to testimony and
testimony of the witness-spouse, which the court quoted in full in the opinion:

We find the following testimony significant: Q. (Mr. Marchiondo, Attorney for Kapnison). Your husband did not want a divorce, and wanted to remain married to you at that time, is that correct? A. (Natalyn Kapnison). No, sir, that is not correct. . . . [Y]ou remember the three-way conversation, this was before the grand jury, and I don't want to be offensive here in this courtroom, but Nick was on one phone, I was on another, and you were on another. And he says, "I've been trying to get rid of this so-and-so for 20 years, and now she wants a divorce when it's inconvenient."

And I pleaded with you to help me, that I was afraid. . . . So he was not trying to reconcile at that time, no, sir.

Q. And even from that time on through January, through February and even before the divorce, he tried to persuade you not to get a divorce, isn't that so?

A. No, sir. At that time, he did not. I don't remember the exact dates, but when the grand jury subpoenaed me is when he started being nice.1

Based on this testimony and citing Trammel, the court rejected the defendant's contention that his wife's testimony before the grand jury and at trial violated the adverse spousal testimony privilege.114

In Kapnison, as in Neal, the court found the motivation for this testimony in the disrepair, even the demise of the marital relationship—not in any coercion or more subtle persuasion on the part of the government. In such analyses, the deconstruction of the marital privilege is complete. What had been implicit in the practice of the federal courts long before Trammel has become explicit in the years since. The substantial marital relationship itself has emerged as both logical and phenomenal cause and ground of the privilege's increasingly clear definition.115

B. The Exclusion of Criminal Communications

With the admission of voluntary spousal testimony established as the rule by the Supreme Court in Trammel, the issue of compulsion of spousal testimony became the chief concern of the federal courts in defining the scope of the marital privilege. An exception to the

out of the presence of the jury of her privilege not to testify against the defendant; the witness-spouse in response indicated her desire to testify, and on cross-examination acknowledged that she had the right not to testify but that she chose to do so; the trial court then ruled that the witness-spouse would be allowed to testify about her observations, and about conversations with her husband in the presence of third parties, but that she would not be allowed to testify to private conversations. The Tenth Circuit Court of Appeals approved the trial court's actions, stating, "[t]his rule is in accordance with Trammel." Id. at 641-42.

But see Neal, 743 F.2d at 1444. Reviewing a district court's ruling in similar circumstances, the same court stated: "We regard the district court's ruling in this respect [that the witness-spouse could not testify to a confidential communication in which the defendant, her spouse, had told her about the crime] to have been taken out of an abundance of caution." Id. In some circumstances a witness-spouse may testify to confidential communications. See infra notes 116-36 and accompanying text.

113. Kapnison, 743 F.2d at 1453-54.
114. Id. at 1454.
115. Compare supra notes 8-9 and accompanying text.
Hawkins rule barring spousal testimony had been developed by the federal courts in the years prior to Trammel, admitting voluntary adverse testimony where the spouses were joint participants in crime.116 Immediately after the Trammel decision was handed down, the Third Circuit Court of Appeals in Appeal of Malfitano117 was asked to establish a rule that spousal testimony could be compelled where the witness-spouse is alleged to be involved in the criminal acts of the nonwitness-spouse.118 The court rejected this proposed exception, reasoning that the mere allegation that married parties are involved jointly in criminal acts does not lead to the conclusion that a marital relationship does not exist. Distinguishing compelled spousal testimony from voluntary testimony, the court cited Trammel:

The Supreme Court explicitly relied on the fact that if the witness spouse is willing to testify, then the marriage probably is beyond salvage. The Court seems to have assumed that this provides adequate safeguards insofar as the marriage has fallen apart due to the criminal activity of at least one of the

116. See supra notes 36, 60 and accompanying text.

117. 633 F.2d 276 (3rd Cir. 1980). The appellant in Malfitano appealed a contempt order for refusing to answer questions before a grand jury investigating an alleged criminal conspiracy involving her husband, other individuals and several corporate entities. The court determined that the appellant had:

invoked the privilege, which is the proper course under Trammel. Moreover, all of the questions would seem to implicate her husband. He is the president of all of the corporations involved, and the questions about the June 15 meeting would implicate him either if he attended it or because it was held at one of the corporate offices . . . . Thus unless there is something that indicates that the rationale for the privilege does not apply here, reversal of the contempt citation is required.

Id. at 277.

118. "The major justification offered by the government for not according appellant the privilege is the fact that she was allegedly involved in the criminal acts of her husband." Id. at 278. The government filed an affidavit stating that they had "received information from a cooperating witness in this matter indicating that Ruth Malfitano is a co-conspirator by reason of her knowledge of the object of the conspiracy and her facilitation of the attainment of the object of the conspiracy." Id. at 278 n.3 (emphasis added). A comment of the court indicates the flimsy basis of the exception proposed by the government, especially in the context of potential conspiracy charges: "Given the intimacy of marriage and the fact that conspiracy is a rather flexible concept, it will be quite easy to allege that the spouses are partners. Ironically, the closer the marriage, the more likely it will appear that both spouses are involved." Id. at 279.

The good judgment of the court may be illustrated by a comparison to the factual circumstances of Blau v. United States, 340 U.S. 332 (1951), in which the Supreme Court held that a husband was privileged to refuse to disclose the whereabouts of his wife to a grand jury which had subpoenaed her. See supra note 32 and accompanying text. Certainly in Blau, both spouses were involved in concealing the wife's location; however, to consider the husband a co-partner in crime by virtue of his knowledge would be absurd. Cf. infra note 159.
spouses, and the same would seem to be true where both may be involved.\textsuperscript{119}

The refusal of the court in \textit{Malfitano} to recognize the proposed exception to the protection of the marital privilege has led to a perception that the scope of the marital privilege is unsettled in circumstances where criminal involvement of the witness-spouse is alleged.\textsuperscript{120} However, an examination of the cases ruling on the marital privilege where spouses were joint participants in crime reveals that the scope of the privilege in this regard, both prior and subsequent to \textit{Malfitano}, is consistent and well defined. It is the content of particular testimony that has been refused the protection of the marital privilege, not the act of testifying against one's spouse. Neither before nor after \textit{Trammel} removed the bar on adverse spousal testimony has the mere existence of joint crimes itself abrogated the protection of the marital privilege. Where the contents of the testimony sought are otherwise available, however, the courts have consistently held that spousal communications pertaining to ongoing or future criminal activity are not protected.\textsuperscript{121}

Misunderstanding of the court's decision in \textit{Malfitano} is rooted in

\textsuperscript{119} \textit{Malfitano}, 633 F.2d at 278.

\textsuperscript{120} See Purdy, \textit{supra} note 5, at 319-22 ("the applicability of the law of marital privilege is not well settled when spouses engage in criminal activity").

\textsuperscript{121} E.g., United States v. Ammar, 714 F.2d 238 (3rd Cir.), cert. denied, 104 S. Ct. 344 (1983) (wife permitted to testify about confidential marital communications "because they pertained to ongoing or future criminal activity involving both spouses . . . . We reject Ghassan's contention that our decision in Appeal of Malfitano . . . holds to the contrary." \textit{Id.} at 257 (emphasis added) (citation omitted)). See also \textit{Kapnison}, 743 F.2d at 1450 (when a husband and wife form a partnership in crime, extrajudicial statements made in furtherance of the criminal activity may, by consent of the witness-spouse, be used against the other); \textit{Neal}, 743 F.2d at 1444 (conversations between husband and wife about crimes in which they participate are not privileged marital communications); United States v. Archer, 733 F.2d 354 (5th Cir. 1984) (out of court statement of wife to FBI agent is "not brought within . . . privilege merely because she was conveniently available to take the stand . . . and request its exclusion.") \textit{Id.} at 359. Confidential communications between husband and wife in furtherance of embezzlement in which both participants are admissible via that statement. \textit{Id.} at 360; United States v. Broome, 732 F.2d 363 (4th Cir. 1984) (third party testimony about confidential statements of wife to husband revealed to him by husband admissible, where district court found that there was sufficient evidence from which a jury could conclude "that [the husband and wife] were members of the conspiracy" to transport and sell stolen vehicles. \textit{Id.} at 364-65); United States v. Entrekin, 624 F.2d 597, 598 (5th Cir. 1980) (former wife permitted to testify about confidential marital communications in furtherance of mail fraud conspiracy in which both were active participants); United States v. Price, 577 F.2d 1356 (9th Cir. 1978), \textit{cert. denied}, 439 U.S. 1068 (1979) (extrajudicial statements of husband and wife admissible against each other, when made in furtherance of criminal conspiracy); United States v. Mendoza, 574 F.2d 1373, 1381 (5th Cir. 1978), \textit{cert. denied}, 439 U.S. 988 (1978) (taped conversations between husband and wife about crimes in which they were jointly participating when the conversations occurred not within the privilege's protection of confidential marital communications); United States v. Kahn, 471 F.2d 191, 194 (7th Cir. 1972), \textit{cert. denied}, 411 U.S. 986 (1973), \textit{rev'd on other grounds}, 413 U.S. 143 (1974) (intercepted conversations between husband and wife had to do with the commission of a crime and not the privacy of the marriage, and are admissible).
the history of the marital privilege. The federal courts first created the exception to the marital privilege where spouses were joint participants in crime as one of the ways to circumvent the Hawkins rule barring spousal testimony. The factual circumstances in all of these cases indicated the absence of a substantive marital relationship, the most persistent ground for the marital privilege throughout its evolution. In most of these cases, a basis for the admission of voluntary testimony was explicitly found in the absence of the substantive marital relationship. Reflecting the fragmentation of the privilege at that time, however, a joint participants’ exception was also invoked as an independent basis for the admission of adverse spousal testimony. With the Supreme Court’s disapproval of the bar on adverse spousal testimony in Trammel, voluntary spousal testimony is admissible within the rule, without need to resort to exceptional justification. Post-Trammel, the ground for the admission of adverse spousal testimony is the absence of the substantive marital relationship. This is recognized in the voluntariness of the testimony and, most importantly, established in the contents of that testimony, just as it had been in the practice of the courts prior to

122. See generally supra notes 33-66 and accompanying text.
123. Id. See also supra notes 26, 31, 36, 47-49, 60.
124. Id.
125. See supra notes 102-15 and accompanying text. In the exemplary cases of Neal and Kapnison, discussed supra in notes 105-12 and accompanying text, the court also found in the voluntary testimony of the witness-spouse the necessary basis for admitting criminal communications between the spouses. In an opinion concurring in both cases, Judge Logan expressed reservations about admitting otherwise confidential communications by voluntary testimony of a witness-spouse. The reservations are reminiscent of those concerns expressed by Justice Stewart in his concurring opinion in Hawkins (see supra notes 100-01 and accompanying text):

Finally, I see problems in creating a crime-fraud exception or even in making the privilege available only at the option of the testifying spouse or ex-spouse. Prosecutors will be tempted to threaten the spouse they deem less culpable and offer reduced charges or immunity for testimony that will convict but destroy the marriage. Additionally, the reliability of the spousal testimony might be questionable. Confidential communications, by definition, are conversations with only the spouses present. The spouse charged with the crime must surrender the constitutional right not to testify at his or her criminal trial, with all its attendant consequences, in order to refute the other's testimony. And, particularly if the marriage has ended in divorce, the testifying ex-spouse may be tempted to lie or to stretch the truth.

Neal, 743 F.2d at 1448 (Logan, J., concurring). Judge Logan, however, concurred in the admission of Marcia Neal's testimony by finding that the subject of her testimony had both testimonial and nontestimonial aspects, and that the majority of her testimony did not violate a confidential communications privilege. Moreover, he noted that otherwise inadmissible testimony involving marital communications is admissible to impeach a defendant who testifies on his own behalf. Id. (citing United States v. Benford, 437 F. Supp. 589 (E.D. Mich. 1978)).
Trammel.

The court's ruling in Malfitano was based on just such an analysis. Although the court recognized that a joint participants' exception was "supported by dictum or holding in a number of cases," the court framed its inquiry following Trammel: "The question therefore in considering the proposed exception is whether such circumstances mean that the rationale of the privilege is not served in the present case." The question, after Trammel, was no longer the admissibility of available voluntary testimony. Absent the voluntary testimony on which the court could make a determination that the marital privilege was not available, the court refused to compel the testimony of the witness-spouse.

Like the Supreme Court's ruling in Trammel, the court's ruling in Malfitano was deconstructive. Basing its decision on the phenominal ground of the substantive marital relationship, the court did not unsettle the marital privilege, but in fact clarified its scope. A joint participant's exception to the marital privilege has been subsumed into the rule after Trammel, with consequently clearer guidelines for the scope of the marital privilege.

However, although a spouse may not be compelled to testify, the scope of the marital privilege clearly does not extend to protect communications between spouses pertaining to criminal activity. Testimony as to interspousal communications about crimes is admissible, either in voluntary testimony or where otherwise available. The exclusion of criminal communications from the protection of the marital privilege was developed in a second line of federal court rulings on the marital privilege prior to Trammel. Independent of the availability of spousal testimony, the courts ruled that marital communications about crimes in which both spouses were participants were admissible as "not marital communications for the purpose of the marital privilege, and thus . . . not . . . within the privilege's pro-

126. Malfitano, 633 F.2d at 278. The Supreme Court in Trammel recognized exceptions to the Hawkins rule in a footnote that did not mention any exception for joint participants in crime, but linked the exceptions mentioned to both adverse testimony and confidential communications:

The decision in Wyatt recognized an exception to Hawkins for cases in which one spouse commits a crime against the other. 362 U.S. at 526. This exception, placed on the ground of necessity, was a long standing one at common law. See Lord Audley's Case, 123 Eng. Rep. 1140 (1631); 8 Wigmore § 2239. It has been expanded since then to include crimes against the spouse's property, see Herman v. United States, 220 F.2d 219, 226 (4th Cir. 1955), and in recent years crimes against children of either spouse, United States v. Allery, 526 F.2d 1362 (8th Cir. 1975). Similar exceptions have been found to the confidential marital communications privilege. See 8 Wigmore § 2338.

127. See supra notes 8, 43-45, 95 and accompanying text.

128. See supra note 121.
tection of confidential marital communications." From its inception, the exclusion of criminal communications was grounded in the present rationale of the privilege. Such communications are concerned with the commission of a crime, not with the privacy of a marriage; the information sought has nothing to do with intimate marital relations and the privacy interests of husband and wife are not at stake.

Unlike the independent joint participants exception, the exclusion of criminal communications is consistent with the protection of the marital relationship. After Trammel, that relationship becomes the ground of an increasingly coherent privilege. If the spousal testimony sought is otherwise available, the protection of the privilege is coextensive with the boundaries of the confidential relations of husband and wife. If the testimony is prospective, then the contents are presumptively protected by the privilege. Only if it can be shown that the prospective contents fall outside the confidential relations of husband and wife—in this regard, as criminal communications between spouses, both participants—will the testimony by compelled.

As the Supreme Court did in Trammel, courts have analogized the protection of marital communications to the protection afforded by the other confidential communications privileges. However, the marital privilege differs significantly from these other testimonial privileges even in this area where the protection of confidential communications, or lack thereof, suggests commonality. The crime-fraud exception to the attorney-client privilege sanctions and even mandates an invasion of an otherwise protected confidential relationship. In the exclusion of criminal communications from the

129. Mendoza, 574 F.2d at 1381. See supra note 36.
130. Mendoza, 574 F.2d at 1380; Kahn, 471 F.2d at 194.
131. Ryan, 568 F.2d at 543. See also supra notes 36, 64.
132. Trammel, 445 U.S. at 51. See supra note 92 and accompanying text. See also Ammar, 714 F.2d at 258 (the "privilege is akin to the attorney-client privilege, also designed to protect the confidences of the communicator, which has been held not to extend to communications in furtherance of criminal activity"); Maltano, 633 F.2d at 279 n.5 (attorney-client privilege comparison to confidential communication privilege appropriate, but not to adverse testimony privilege); Mendoza, 574 F.2d at 1381 n.6 (since the law does not recognize the attorney-client privilege during or before the commission of a crime, marital privilege will not be allowed in the same situation); United States v. Nelson, 485 F. Supp. 941, 974 (W.D. Mich. 1980) (comparing the physician-patient privilege to the marital privilege); Benford, 457 F. Supp. at 598 (comparing the marital privilege to Draft of Proposed Rule 511, privilege to prevent testimony about confidential matter or communication). See generally Purdy, supra note 5, at 317-22 (comparing the attorney-client privilege to the marital privilege).
133. See Purdy, supra note 5, at 317-19.
protection of the marital privilege, there is no invasion of the protected marital relationship. Testimony is not compelled. Instead, the communication is available outside the confidentiality of the relationship, by what amounts to a qualified waiver of confidentiality: by the witness-spouse in the voluntariness of the testimony; or by a voluntary spousal statement otherwise admissible. As noted above, the waiver is a qualified one. Only if the testimony or otherwise available spousal statement falls outside the confidential relations of husband and wife, in this instance as criminal communications between spouses, will it be deemed admissible.

C. The Definition of Adverse Testimony

Appeal of Malfitano was also important in defining the scope of the marital privilege as the first in a line of cases concerned with the definition of adverse testimony. The court in Malfitano refused to compel a witness-spouse to testify before a grand jury pursuing an investigation in which her husband was a target. In so doing, the court rejected the premise of the district court's order of contempt, "that because the government has promised not to use appellant's testimony in future proceedings against her husband, the appellant has no reason to invoke the privilege." The court held that the testimony was adverse, and therefore the privilege existed, because the

134. Kapnison, 743 F.2d at 1453-54; Neal, 743 F.2d at 1444-45; Ammar, 714 F.2d at 257-58; Entrekin, 624 F.2d at 598. See supra notes 121, 125.
135. Archer, 733 F.2d at 369; Broome, 732 F.2d at 364-65; Price, 577 F.2d at 1385; Mendoza, 574 F.2d at 1380; Kahn, 471 F.2d at 194. See supra note 121.

The waiver appears to be a crucial factor. In United States v. Geller, 560 F. Supp. 1309 (E.D. Pa. 1983), the court admitted the voluntarily spoken, intercepted, taped communications of each spouse concerning the crime with which they were charged as codefendants. Citing United States v. King, 536 F. Supp. 253, 267 n.22 (C.D. Cal. 1982), the court noted that, while there was "no error in introducing taped spousal communications where one spouse consents thereto," recordings of conversations directly between the spouses were not admissible. Geller, 560 F. Supp. at 1326. The court's ruling in Geller is weakened as precedent by supporting the ruling entirely on state cases and a dubious extension of Malfitano to cover these already available "conspiratorial utterings between spouses." Id. at 1327. Contrary to the federal courts, state courts modernly appear to extend the marital privilege to prevent testimony as to communications eavesdropped by the connivance or betrayal of the spouse to whom the communication was addressed. See Annot., 3 A.L.R.4th 1104 (1981).

136. As has historically been the pattern, the most recent cases find multiple bases for finding that testimony or otherwise available spousal statements fall outside the confidential relations of husband and wife. See, e.g., Neal, 743 F.2d at 1446 (basis for admission in impeachment). See also Kapnison, 743 F.2d at 1453 (statements revealed to third parties by defendant who made them). The common basis, although not explicitly linked with the criminal communications exclusion, appears to be the absence, at the time the communications were made, of a substantive and viable marital relationship, as evidenced in the voluntary testimony of the witness-spouse. Compare supra notes 108, 113 and accompanying text.
137. 633 F.2d 276 (3rd Cir. 1980). See supra note 117.
138. Malfitano, 633 F.2d at 279.
grand jury may indict the witness' husband on the basis of her testimony. Citing In re Snoonian, a First Circuit case decided in 1974, the court stated that if the witness' spouse were not a target, and the government expressly promised that there was no intention to prosecute the spouse on the basis of the witness' testimony, then there would be no privilege against compelled testimony.

Courts ruling on the compulsion of spousal testimony in subsequent cases have further refined the definition of adverse testimony. Not all testimony that is situationally adverse to the witness' spouse falls within the protection of the marital privilege. The privilege is not absolute, and a witness-spouse may be compelled to answer certain questions, even in a grand jury investigation where the spouse is a target.

The Fifth Circuit Court of Appeals ruled in In re Grand Jury Proceedings that the witness-spouse could be required to answer "'objective' questions containing no reference to her husband . . . neither calculated to, nor capable of incriminating her husband." However, the court upheld the privilege with respect to two other questions, because the answers "might reflect negatively on her husband's innocence." The basis for the determination was the

139. Id. at 279-80.
140. Id. at 280 (citing In re Snoonian, 502 F.2d 110 (1st Cir. 1974)). In Snoonian, the government filed an affidavit stating: "On behalf of the United States Government, I hereby represent and agree that no testimony of Gary Snoonian before the Grand Jury, or its fruits, will be used in any way in any proceeding against his wife." Snoonian, 502 F.2d at 112. See infra note 149.
141. In re Grand Jury Proceedings, 664 F.2d 423 (5th Cir. 1981), cert. denied, 455 U.S. 1000 (1982). The court affirmed the civil contempt conviction of a witness-spouse who refused to answer specific questions before a grand jury investigating an alleged unlawful campaign by the Church of Scientology to harass, discredit, and silence organizations critical of the church. Both husband and wife were members of the Church of Scientology. The government alleged specifically that the husband, an attorney, acted as an undercover operative for the church and breached attorney-client relationships by disclosing confidential communications to the church and its attorneys. Id. at 424.
142. Id. at 430.
Questions as to whether she resided in Pinellas County; whether she is a member of the Church of Scientology; whether she was ever employed by the Church; and whether she knows Cazares or worked in his election campaign, appear entirely innocuous, neither calculated to, nor capable of incriminating her husband. Id.
143. Id.
same as that in *Malfitano*; where the testimony is not adverse, it does not fall within the protection of the marital privilege.

Substantive adverse impact appears to be the standard for determining whether testimony is adverse. Although the question has not been ruled on directly, dicta in at least one case in the Seventh Circuit, *United States v. Clark*,144 indicates that compulsion of facially exculpatory testimony, if used by the government to obtain a conviction, would not be approved.145

The cases above constitute relatively well-settled precedent that spousal testimony directly adverse to the nonwitness-spouse is protected by the marital privilege. The extent to which the privilege may be upheld to protect indirectly adverse spousal testimony is less settled. In a case subsequent to *Malfitano*, *In re Grand Jury Matter*,146 the same court extended the protection of the marital privilege to a witness-spouse's testimony concerning a third party, when that testimony would indirectly incriminate her husband.147 The court's

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Vannier's contempt conviction as to those latter questions only, on the grounds of spousal privilege. In doing so, the court rejects a sweeping application of the privilege to the five preceding questions. In *United States v. Brown*, 605 F.2d 389 (8th Cir. 1979), the court reached the same conclusion when it refused to apply the marital privilege to objective questioning . . .

*Id.* (footnote omitted). The court's decision in *In re Grand Jury Proceedings*, however, differs from *Brown* in that the witness-spouse's testimony in *Brown* was defined as "objective" because her marriage to the defendant was virtually nonexistent. See *supra* note 53 and accompanying text. In *In re Grand Jury Proceedings*, the determination that the questions were "objective" was reached in the context of an ongoing and unquestioned marital relationship.

144. 712 F.2d 299 (7th Cir. 1983).

145. *Id.* at 303. In *Clark*, the court affirmed on other grounds the criminal contempt conviction of a husband who refused to testify at the trial of his wife for a bank theft in which both participated, prior to their marriage. He had testified at his own trial that his wife was not involved, and was subpoenaed to his wife's retrial because the government believed the incredibility of his testimony would bolster the government's case. *Id.* at 300. The *Clark* opinion virtually stands alone among the cases since *Trammel* in its singularly restrictive definition of the marital privilege (no privilege for joint participants in crime; no privilege for acts prior to marriage). Therefore, the reservations the court expresses about facially exculpatory testimony as ostensibly nonadverse are the more persuasive.

146. 673 F.2d 688 (3rd Cir.), cert. denied, 459 U.S. 1015 (1982). In *In re Grand Jury Matter*, the United States appealed from an order denying the government's motion to compel the testimony of an immunized witness-spouse before a grand jury investigating a conspiracy to distribute illegal drugs in which both she and her husband were allegedly involved. The witness-spouse had previously been convicted for her participation in the illegal drug operation; her spouse along with several other named co-conspirators were targets of the grand jury investigation. The court affirmed the denial of the government's action to compel. *Id.*

147. *Id.* at 692. The court stated, in pertinent part:

> We hold that when, as in the present case, the Government openly seeks one spouse's testimony concerning the activity of a third party, who is alleged to have engaged in a common criminal scheme with a husband and his wife, and the Government thereby hopes also to reach the nonwitness spouse, the testimony sought is sufficiently adverse to the interests of the absent spouse to permit invocation of the privilege against adverse spousal testimony.

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decision was much criticized as an expansion of the marital testimonial privilege to protect testimony with any tendency, no matter how speculative, to be adverse to the nonwitness-spouse.\textsuperscript{148}

However, analyzed in the context of \textit{Malfitano} and \textit{Snoonian}, the two cases upon which the court relied, the court's analysis in \textit{Grand Jury Matter} in fact clarifies the definition of adverse testimony. In \textit{Snoonian}, the court held that "the speculative nature of the threat [to the non-testifying spouse], coupled with the government's unequivocal and convincing promises not to use any of the testimony against her," provided no grounds in the marital privilege for the witness' refusal to testify.\textsuperscript{149} In \textit{Malfitano}, the court upheld the marital privi-
lege since the threat to the nontestifying spouse, a target of the grand jury investigation, was direct, and the government's promise not to use the witness-spouse's testimony in a future proceeding provided no protection against its immediate use by the grand jury.\footnote{150}

In *Grand Jury Matter*, the court found that the threat to the nontestifying spouse, a target of the grand jury investigation, was explicit and clear, and the government's agreement to refrain from naming the witness' husband in an indictment presented to this particular grand jury was insufficient to render the testimony nonadverse.\footnote{151}

The government's express intention was to empanel a separate grand jury to pursue the same investigation, with the objective of the nonwitness-spouse's indictment. The court found the government's sole purpose for doing so to be circumvention of the marital privilege.\footnote{152} The court indicated that speculative or attenuated adverse impact on the other spouse would not warrant the protection of the marital privilege,\footnote{153} but concluded that the adverse impact of the testimony would be made against the nontestifying spouse, "nullifies any claim of privilege as grounds for Snoonian's refusal to testify." \textit{Id.} at 113. See also supra note 140.

\footnote{150.} \textit{Malfitano,} 633 F.2d at 279. See supra notes 137-40 and accompanying text. See also supra note 117.

\footnote{151.} An important issue in the court's analysis of the spousal testimony sought to be compelled was the adequacy of the procedural safeguard proposed by the government. In the court's view, the government's promise only to refrain from naming the witness' spouse in an indictment presented to this particular grand jury was a retreat from an initial offer of immunity contained in an affidavit in support of the original motion to compel. \textit{In re Grand Jury Matter,} 673 F.2d at 690. The court emphasized the original affidavit's certification that "nothing said by the witness before the grand jury would be used 'either directly or indirectly, against her husband, in any legal proceedings.'" \textit{Id.} (emphasis in original). The court cited with apparent approval the district court's conclusion "that the Government was attempting to renege on its initial sworn promise." \textit{Id.} at 691.

The government affidavit filed in this case was "of the type used in \textit{In re Snoonian.}" Purdy, supra note 5, at 324 (footnote omitted). Compare supra note 140. Purdy notes in his discussion of the case that the indirect use of the witness-spouse's testimony foregone in the government's second affidavit should be construed as relating only to presenting an indictment against the nontestifying spouse to the grand jury which had heard the witness-spouse's testimony. \textit{Id.} at 324 n.107. It is not surprising that this contention did not succeed with the court of appeals. The language of the affidavit, the interpretation of that same language in the \textit{Snoonian} and \textit{Malfitano} opinions, and the contents of colloquies before the district court quoted extensively by both the court in \textit{In re Grand Jury Matter} and by Purdy in his article, all support the interpretation of the government's affidavit by the district court and court of appeals.

\footnote{152.} \textit{In re Grand Jury Matter,} 673 F.2d at 693. The court noted:

Finally, we do not believe that the simple expedient of bringing the husband's indictment before a separate grand jury adequately respects the privilege . . . . [W]e do not believe that the Government should be permitted to bootstrap into two proceedings a prosecution based on a single common scheme for the sole purpose of circumventing the privilege. It would be anomalous to permit the Government to do indirectly what it is forbidden to do directly.

\textit{Id.} at 693 n.11.

\footnote{153.} "Although we agree that in certain circumstances the link between one spouse's testimony and its potential adverse impact on the other spouse may be too at-
wife’s testimony in the present circumstances was clear:

The only difference that exists in the present case from the *Malfitano* decision is that the testimony of the wife here will not directly implicate her husband before the same grand jury before which she is testifying. Rather, it will indirectly implicate her husband in a future legal proceeding. As such, the effect is the same; the danger to the marital relationship is as manifest.154

Despite the concerns expressed by some commentators that the definition of adverse spousal testimony following *In re Grand Jury Matter* is overbroad,155 a review of the cases in which the courts have refused to compel spousal testimony reveals that the concerns are unfounded, at least thus far. The opinions discussed above provide clear criteria for determining whether spousal testimony is sufficiently adverse to warrant the protection of the spousal privilege. Generally, spousal testimony will not be compelled when the nonwitness-spouse is a defendant in the criminal proceeding or an express target of the investigation underlying the criminal proceeding.156 If the spousal testimony is indirectly adverse, e.g., testimony concerning a third party or a specific topic other than the nontestifying spouse, the link between the testimony sought and its potential adverse impact must be neither speculative nor attenuated.157 There appears to be an implicit presumption that such testimony is not adverse, which is overcome only by clear evidence to the contrary in the record,158 or the nature of the specific offense alleged.159 Moreover, the witness

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154. *Id.* at 691 (quoting the lower court’s opinion) (emphasis added).
155. See *supra* note 148.
156. "Target" is defined as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him to the commission of a crime and who, in the judgment of the prosecutor is a putative defendant." United States Department of Justice, United States Attorneys’ Manual, tit. 9-11.250 at 12 (1979).
157. See, e.g., *supra* notes 117 (questions would implicate nonwitness-spouse), and 142-43 (nonincriminating questions differentiated from incriminating questions).
158. See, e.g., *In re Grand Jury Matter*, 673 F.2d at 692 n.10 (colloquy before the district court).
159. See, e.g., *In re Grand Jury Proceedings*, 664 F.2d at 431-33 (Hill, J., concurring in part and dissenting in part). Judge Hill stated:

The majority fails to appreciate the peculiar effect that the probable conspiracy indictment has upon any invocation of that [marital] privilege . . . .

With this setting in mind, it becomes clear that the questions posed to Mrs. Vannier were not "innocuous," as the government contends and the majority agrees, but contain potential for providing a link in a chain of evidence which might be used to convict Mr. Vannier. Under the law of conspiracy, the acts of one co-conspirator in furtherance of the unlawful agreement are admissible against all, even in the absence of the other’s approval of these overt acts . . . . The overt act itself need not be criminal if it is in furtherance of the
has the burden of establishing that the other spouse may be adversely implicated by the testimony.\textsuperscript{160} The definition of adverse testimony that emerges from these criteria is neither uncertain nor overbroad.

Finally, spousal testimony otherwise adverse to the nonwitness-spouse may be rendered non-adverse by the procedural safeguard of immunity, and thus fall outside the protection of the marital privilege. The uses of immunity have rarely been absent from the analyses of the courts concerned with the definition of the marital privilege. The \textit{Hawkins} rule’s rejection of voluntary spousal testimony had involved the courts in discussion of the grant of immunity to the witness-spouse.\textsuperscript{161} In the decade before \textit{Trammel}, at least two circuits, ruling that spousal testimony could be compelled, cited as partial justification the fact that both spouses had been immunized.\textsuperscript{162} After \textit{Trammel}, as an increasingly clear definition of adverse testimony emerged, a grant of use-fruits immunity to the nonwitness-spouse has concomitantly been advocated as the solution to “a difficult question concerning the proper scope of the privilege.”\textsuperscript{163}

At the present time it is clear that the government may offer to provide use-fruits immunity to the nonwitness-spouse and expect that the testimony of the witness-spouse will be compelled. This grant of immunity insulates the witness-spouse from testifying adversely to the other spouse, constituting “a complete answer to the claim of marital privilege.”\textsuperscript{164} However, a suggestion that the court grant use-fruits immunity to the nonwitness-spouse, specifically in the context of the attempted prosecution of a third party, has not met with approval or emulation by any court.\textsuperscript{165} In effect, the courts’

\textit{unlawful agreement . . . and it may occur before or after the others join the conspiracy.}

\textit{Id.} at 431-32 (citations omitted).

Judge Hill’s analysis further explains the court’s reluctance to compel adverse testimony in \textit{Malfitano}, and is supported by the court’s comments in that case. \textit{See supra} note 118.

\textsuperscript{160} \textit{In re Grand Jury Matter}, 673 F.2d at 694 n.12 (“If . . . the Government concedes that the nonwitness spouse is a target of the investigation, or if the witness otherwise meets the burden of establishing that the other spouse may be adversely implicated by the required testimony,” the testimony will not be compelled, or use-fruits immunity will be granted. \textit{Id.} (emphasis added)).

\textsuperscript{161} \textit{See, e.g., Trammel}, 445 U.S. at 42-43.

\textsuperscript{162} \textit{Ryan}, 568 F.2d at 543 (Seventh Circuit; \textit{see supra} notes 64-65 and accompanying text); \textit{United States v. Doe}, 478 F.2d 194, 195 (1st Cir. 1973) (where both spouses are granted immunity they can no longer invoke the privilege against adverse spousal testimony).

\textsuperscript{163} \textit{In re Grand Jury Matter}, 673 F.2d at 695 n.12.

\textsuperscript{164} \textit{Malfitano}, 633 F.2d at 281 (Gibbons, J., concurring).

\textsuperscript{165} \textit{In re Grand Jury Matter}, 673 F.2d at 694 n.12. Judge Rosenn, in a footnote to the majority opinion, proposed court conferral of use-fruits immunity on the witness’ spouse:
grant of use-fruits immunity coextensive with the scope of the privilege would equate the marital privilege with the privilege against self-incrimination.\textsuperscript{166} Since the marital privilege is not absolute and has never been independently granted constitutional status, the failure of this proposal is not surprising.\textsuperscript{167} Nonetheless, the courts' recognition of the grant of use-fruits immunity by the government as both necessary and sufficient to warrant the compulsion of testimony otherwise protected by the marital privilege suggests the extension of a right against incrimination to the marital relationship that is like the constitutional right against self-incrimination in nature, if not in scope. This suggests the importance the courts continue to place on the peculiarly confidential relations of husband and wife in which the marital privilege has long been grounded.

\textbf{D. The Scope of the Marital Relationship}

The courts have long conditioned the protection of the marital privilege on the existence of a legally valid marriage, not entered into

\begin{quote}
I believe that the district court can respect the witness' privilege against adverse spousal testimony without also interfering with the Government's attempted prosecution of the third party, about whose activity the wife is being asked to testify. Writing in concurrence in \textit{Malfitano}, Judge Gibbons recognized that the district court has the inherent authority to confer use-fruits immunity on the witness' spouse . . . . In other words, the court has the power to order that neither the witness' testimony, nor the fruits thereof, can be used in any subsequent prosecution against her husband. Once the wife's testimony is immunized, the Government bears the burden in any subsequent prosecution of establishing that the evidence it proposes to use against the husband is derived from a legitimate source wholly independent of his wife's testimony. . . . The wife's testimony can then be compelled without abrogating the privilege.

\textit{Id.} (citations omitted). Judge Sloviter, who concurred in all but Judge Rosenn's footnote 12, criticized the proposal as an invitation for the courts to intrude into an area more appropriately left to prosecutorial discretion. \textit{Id.} at 695-96 (Sloviter, J., concurring). \textit{See also} \textit{Purdy}, supra note 5, at 325-27 (government forced to risk virtually unlimited immunization of nonwitness-spouse).

166. See Note, supra note 20, at 132 n.70, 136 n.91 ("By applying this analysis to the case at hand, the court apparently has treated the marital privilege as co-extensive with the privilege against self-incrimination—an extraordinary analogy in view of the reverence that constitutional privilege is accorded and the relative disdain with which the marital privilege is often viewed." \textit{Id.} at 136 n.91).

167. \textit{In re Grand Jury Proceedings}, 664 F.2d at 429-30 (rejecting assertion that the marital privilege is co-extensive with the constitutional privilege against incrimination); \textit{Snoonian}, 502 F.2d at 112-13 (the scope of the marital privilege has never been construed as absolute); \textit{But see In re Grand Jury Proceedings}, 664 F.2d at 431 (Hill, J., concurring in part and dissenting in part) (under the peculiar circumstances of a conspiracy involving both husband and wife . . . the privileges against adverse spousal testimony and against self-incrimination are co-extensive).

761
for fraudulent purposes. In the years before the Supreme Court disestablished the involuntary bar on spousal testimony in *Trammel*, the courts created an exception to admit voluntary spousal testimony, evading the *Hawkins* rule, where they were able to determine that no substantive marriage relationship existed. When the Supreme Court validated the courts' practice in *Trammel*, the Court also in effect appears to have established its inverse corollary: adverse spousal testimony will not be compelled where that testimony falls within the boundaries of a legally valid and substantively viable marital relationship. The exception based on the absence of a substantive marital relationship has effectively been subsumed in the post-*Trammel* rule in accordance with the Court's virtual equation of voluntary testimony and the absence of the protected relationship.

Since *Trammel*, the protection of the marital privilege continues to be terminated when the marriage ends or is found to be invalid. The right of a presently-married spouse to invoke the protection of the marital privilege with regard to matters occurring prior to the marriage is less well settled. In the context of a marital relationship apparently accepted as valid, the Seventh Circuit Court of Appeals in one case has promulgated a general rule that the protection of the marital privilege does not extend to present testimony about matters occurring prior to marriage. However, no other circuits have followed the Seventh Circuit in so ruling, and the case itself is unclear as precedent, since a pre-marriage exclusion is one of two independent grounds cited as the basis for the compulsion of testimony, and the precedent the court cites is equivocal.

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168. See supra notes 51-52 and accompanying text.
169. See supra notes 53-59 and accompanying text.
170. See supra notes 102-03 and accompanying text.
172. United States v. Clark, 712 F.2d 299 (7th Cir. 1983). The court affirmed the criminal contempt conviction of the defendant for refusing to testify at the trial of his wife for her participation in a crime for which he had already been convicted. The marriage occurred after the alleged crime and prior to the trial. The court found "no evidence that [the] marriage was a sham," but stated:

Although it is true that *Van Drunen* created the premarriage acts exception because of a concern with collusive marriages, there is nothing in the opinion to suggest that the exception applies only when there is evidence presented of a collusive marriage. By imposing a general rule that the privilege does not cover premarriage acts, courts can avoid mini-trials on the issue of the sincerity of the parties in getting married.

Id. at 302.
173. The court examined three reasons for refusing to apply the marital privilege: joint participation in the underlying offense ("the exception which most clearly defeats" the assertion of the privilege); testimony about conduct prior to marriage; and facially exculpatory testimony. Id. at 300. The precedent chiefly relied upon was the Proposed Draft Rule that was never adopted. See supra notes 71, 145 and accompanying text.
Although it is questionable whether a presently-married spouse may be compelled to testify about matters which occurred prior to marriage, several recent cases suggest that past testimony of the spouse, prior to the marriage, does not fall within the scope of the marital privilege. In *United States v. Barlow,*\(^\text{174}\) the Sixth Circuit Court of Appeals held that testimony of the defendant's wife before a grand jury prior to her marriage could be admitted against the defendant at his trial, even though the defendant's wife had properly invoked the marital privilege and could not be compelled to testify.\(^\text{175}\) At least one district court in the Ninth Circuit has followed *Barlow* to admit premarriage grand jury testimony of one spouse adverse to the other.\(^\text{176}\) In both cases, the court determined that the grand jury testimony met three criteria for admissibility. First, the witness-spouse was "unavailable" because she properly invoked the marital privilege, and could not be compelled to testify.\(^\text{177}\) Second, the grand jury testimony possessed "circumstantial guarantees of trustworthiness."\(^\text{178}\) Finally, admission of the grand jury testimony

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175. Id. at 960-63. In *Barlow,* the court affirmed the defendant's conviction for conspiracy and theft from interstate shipment. Prior to her marriage to the defendant, the prospective witness-spouse had given testimony to the grand jury contradicting his alibi. *Id.* at 957. Neither the defendant nor the witness-spouse testified at the trial.
176. United States v. Marchini, No. LV 84-15 HEC (D. Nev. 1984), appeal docketed No. — (9th Cir. 1984). Defendant Marchini was convicted of criminal tax offenses. At trial, the witness-spouse invoked her marital privilege not to testify against the defendant; the defendant testified. Following *Barlow,* the court admitted grand jury testimony of Mrs. Marchini, given prior to her marriage to the defendant, concerning accounting and bookkeeping practices of the defendant's business where she had been employed during the period of the alleged offenses.
177. *Barlow,* 693 F.2d at 961-62.
178. *Id.* at 962. "Second, the trial court must determine whether the substance of the grand jury testimony possesses 'circumstantial guarantees of trustworthiness' equivalent to the other exceptions included in Rule 804.' The court found "substantial" circumstantial guarantees of trustworthiness in *Barlow:* as the defendant's prospective wife, the declarant had no motive to implicate the defendant and exculpate herself; her testimony conveyed information of which she had personal knowledge; other testimony corroborated the substance of the grand jury testimony. *Id.*
served the "purposes of the [rules of evidence] and the interests of justice..." The court in Barlow, while noting that for purposes of the protection of the marital privilege the present marriage was not a sham, nonetheless found the defendant's marriage to the prospective witness prior to trial to be a factor the "court may consider" with respect to the last criterion.180

The scope of the marital privilege defined in these cases appears to be co-extensive with the substantive marital relationship. No question was raised in either of these cases of the participation of the prospective witness-spouse in the alleged crime, nor of the adversity of the testimony sought, nor of the existence of a valid and viable marriage at the time the testimony was sought. Absent the availability of one of these exclusions, the clear implication is that the privilege here also is grounded in the confidential relations of husband and wife. Present relations are protected by the spouse's privilege to refuse to testify within the scope of these relations. Protection does not extend into the past any further than the recognized establishment of the marriage relationship.181

V. CONCLUSION: THE EMERGENCE OF A UNIFIED MARITAL PRIVILEGE

Echoing the predictions of the commentators, many of the courts defining the marital privilege since Trammel have referred to the disfavor into which the privilege has fallen and the continued erosion of its protection, whether against compelled adverse spousal testimony, or against the revelation of confidential marital communications.182 In fact, an examination of the rulings of the federal courts on the marital privilege since Trammel reveals the emergence of an increasingly unified, coherent privilege.

The process began with Trammel, where the Supreme Court finally rejected the ancient cultural construct of spousal incompetency, grounding a marital privilege against compelled adverse testimony on the same rationale in which the confidential marital communications

179. Id. (citing Fed. R. Evid. 804(b)(5)(C)).
180. Id. The court stated:

We therefore believe the trial court may examine the reasons for the witness' unavailability. For example, the appellant in the instant case chose to marry lantha Humphries before trial which permitted her to assert her marital privilege. His role in making her unavailable militates in favor of admitting the grand jury testimony. We do not believe that the marriage was a sham; it was not and the court below stated so... We simply state that among the many factors which a court may consider in determining the admissibility of grand jury testimony is the extent of the defendant's role in making the witness unavailable.

Id.
182. See supra note 90.
privilege had long been based, "the confidence of the marital relationship . . . 'the best solace of human existence.' " Although the courts have continued to discuss the marital privilege as two privileges, in fact they are discussed as aspects of a single zone of privilege, whose borders are those of the substantive marital relationship, the peculiarly confidential relations of husband and wife. Stated most simply, the post-Trammel marital privilege vests a right solely in the prospective witness-spouse to refuse to testify adversely to the other spouse in a criminal proceeding. With the question of voluntariness settled, the inquiry of the courts turned to the scope of such a privilege: under what circumstances, and about what matters may an unwilling spouse be compelled to testify?

After Trammel, the courts have been concerned with exclusions from the scope of the marital privilege, rather than exceptions to its invocation—hence the form of the courts' inquiry. Exceptions had been created by the federal courts in their frustration with the perpetuation of spousal incompetency by the Hawkins rule. Each succeeding opinion in that period may be viewed as a deconstructive critique of the rule, with the emergent definition of the marital privilege found in the exception created: voluntary testimony, the exclusion of criminal communications, the uses of immunity, even a redefinition of the protected relationship itself. With the removal of the Hawkins bar, the exceptions in effect became the rule. That the exceptions were subsumed into a rule is precisely the evolution of the marital privilege traced here; such development has resulted in the emergence of an increasingly coherent and unified marital privilege.

Moreover, the coherent marital privilege after Trammel has embraced the privilege that developed separately protecting confidential

184. See, e.g., Neal, 743 F.2d at 1447 (Logan, J., concurring) ("The privilege against adverse spousal testimony and the privilege for confidential marital communications are closely related; both are intended to protect marital confidences."); id. at 1449 (Jenkins, J., concurring) ("The twin facets of the rule suggested by the court—the privilege and the Crime-Fraud exception [sic]—assume the existence in fact of a confidential communication"); United States v. Nelson, 485 F. Supp. 941 (W.D. Mich. 1980) (discusses "two distinct privileges," but subsumes both in a right to privacy).
185. See, e.g., Malfitano, 633 F.2d at 277 ("The crux of this privilege is that a person may not be forced to be a witness against his or her spouse in a criminal proceeding.").
186. See supra notes 98-115 and accompanying text.
187. See supra notes 116-36 and accompanying text.
188. See supra notes 137-67 and accompanying text.
189. See supra notes 168-81 and accompanying text.
marital communications. The scope of the marital privilege is the same, whether the courts are ruling on the compulsion of spousal testimony, or the admission of marital communications. In the refusal to compel spousal testimony, protection is extended to prospective confidential communications; in the refusal to admit confidential marital communications, protection is extended to prior confidential relations. The phenomenological formulation differs in tense but not in substance—what is protected by the marital privilege is the substantive marital relationship described by the Supreme Court nearly a century ago as the peculiarly confidential relations of husband and wife. The emergence of the marital privilege as a single phenomenological formulation is the result of a deconstructive process, the case by case analysis in the light of reason and experience that focuses on the grounds of the system's possibility.

The definition of the privilege is dynamic, rather than static; the mandate of the light of reason and experience is an ongoing deconstructive process. The starting point in the common law for the deconstructive analysis is not a natural given, but a cultural construct. The outmoded cultural construct of spousal incompetency was once the logical and rhetorical ground of the marital privilege. With its erosion and disapproval, the confidential relations of husband and wife have increasingly been grounded by the courts in the emergent cultural construct of the right to privacy. At the present time, the marital privilege and an implicit right to privacy stand in a referential relation to each other, finding a common phenomenal ground in the substantive marital relationship.

190. Compare supra notes 136, 181 and accompanying text.
191. See supra notes 8-9 and accompanying text.
192. See supra notes 132-35 and accompanying text.
193. The Supreme Court has developed the right of privacy by explicit reference to the marital relationship, most prominently in Griswold v. Connecticut: "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." Griswold, 381 U.S. 479, 486 (1965); and Roe v. Wade: "[T]he court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." Roe v. Wade, 410 U.S. 113, 152 (1973) (citing six cases in addition to Griswold that "make it clear that the right has some extension to activities relating to marriage . . ."). In an extended discussion of the marital privilege in United States v. Nelson, the court stated:

[The] protection of the family, and of marital relationships, is one of the highest priorities of the law. As Justice Harlan wrote in Poe v. Ullman, 367 U.S. 497 . . . "The home derives its pre-eminence as the seat of family life and the integrity of that life is something so fundamental that it has been found to draw to its protection of the principles of more than one explicitly granted Constitutional right . . . Of this whole private realm of family life it is difficult to imagine what is more private, or more intimate than a husband and wife's marital relations."

Nelson, 485 F.2d at 946. See also Comment, The Child-Parent Privilege: A Proposal, 47
terests have been explicitly protected by the marital privilege, the courts have ventured in very few instances beyond the confidential relations of husband and wife to provide analogical protection to other relationships.

Of course, the rhetorical ground available to the marital privilege in a right to privacy itself is a cultural construct, no more natural than its predecessors, equally subject to displacement as a philosophical category and attempt at formal definition. But that is beyond the scope of this comment. What has been the focus of this comment is the persistence of the marital privilege in a single phenomenological formulation, protecting an irreducible zone of privacy coextensive with the substantive marital relationship. Grounded in the confidential relations of husband and wife, a right of privacy older than the Bill of Rights, the marital privilege will continue to persist. Its future formulations, in the light of reason and experience, will depend on what new possiblities emerge from that fertile ground.

BARBARA GREGG GLENN

FORDHAM L. REV. 771 (1979). The author proposes and develops a child-parent privilege by reference to other testimonial privileges, with special emphasis on the marital privilege: “[T]he marital privileges[...] continued vitality indicates a legislative and judicial determination that invading the privacy of the marital relationship is simply too high a price to pay for the possible benefits of compelled disclosure.” Id. at 778-79. But see Krattenmaker, supra note 77, at 96-97 (“claims that the Constitution compels recognition of a marital [...] privilege cannot be dismissed cavalierly [...] [but] the constitutional marital privilege rests on only sporadic precedent and virtually no developed doctrine.”).

194. “[T]he right to privacy in marriage is protected by way of two distinct privileges.” Nelson, 485 F. Supp. at 947.

195. See In re Agosto, 553 F. Supp. 1298 (D. Nev. 1983) (refusal to compel grand jury testimony of son against father). The Agosto opinion runs to 33 pages, expounding the historic relations of a right to privacy and testimonial privileges, with particular emphasis on the marital privilege as the appropriate basis for a parent-child privilege which replicates its provisions expansively. Citing Malfitano and Trammel, the court concluded:

Applying this rationale to the case at bar, it is reasonable to hold that Charles Agosto may claim the parent-child privilege not only for confidential communications which transpired between his father and himself, but he may likewise claim the privilege for protection against being compelled to be a witness and testify adversely against his father in any criminal proceeding. The parent-child privilege, then, is based not only on the confidential nature of specific communications between parent and child, but also upon the privacy which is a constitutionally protectable interest of the family in American society.

Id. at 1325. But see Matthews v. United States, 714 F.2d 223 (2nd Cir. 1983) (no privilege to refuse testimony that might incriminate in-laws); United States v. Jones, 683 F.2d 817 (4th Cir. 1982) (no privilege of adult child to refuse testimony adverse to his father, absent confidential communications).