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COMMENT

ADVERSE SPOUSAL TESTIMONY IN MARYLAND AND THE FOURTH CIRCUIT

“When one spouse is willing to testify against the other in a criminal proceeding — whatever the motivation — their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace.”¹

I. INTRODUCTION

When faced with the dilemma of whether to admit adverse spousal testimony, courts and legislatures have reasoned for centuries that concern for the sanctity of the marital relationship outweighs the necessity of obtaining all relevant evidence in a case. Although society's changing attitude toward marriage has not tipped the scales from total incompetence of a witness-spouse to unlimited admission of spousal testimony, the majority of jurisdictions now regard the matter in terms of a limited privilege. Maryland, by legislative enactment,² and the federal courts, by virtue of the United States Supreme Court's recent decision in *Trammel v. United States*,³ now concur in the view that the balance has shifted in favor of admitting the voluntary testimony of a witness-spouse on all matters except those disclosed in privileged marital communications. This comment traces the common law and statutory limitations on spousal testimony and the privileges presently applied in Maryland and the Fourth Circuit.⁴

II. BACKGROUND

A. *Origins*

Any discussion of the origins of modern day spousal privilege must address the attitude of common law society toward the marital relationship. The head of the household in Elizabethan England was viewed as the king of his castle, and an injury to him

1. *Trammel v. United States*, 445 U.S. 40, 52 (1980).

2. See MD. CTS. & JUD. PROC. CODE ANN. §§ 9-105 to -106 (1980).

3. 445 U.S. 40 (1980).

4. The scope of this comment is limited to Maryland and the Fourth Circuit. For a compilation of state statutes regarding the admissibility of spousal testimony, see 2 J. WIGMORE, EVIDENCE § 488 (J. Chadbourn rev. 1979) [hereinafter cited as 2 WIGMORE].

by a family member or servant constituted the crime of petit treason.⁵ Society was no more willing to condone a husband's loss of life or property, by court judgment obtained through the aid of his wife's testimony, than it was willing to allow her to take that same life or property through independent action.⁶

To add to what has been called the "tantalizing obscurity" clouding the origin of rules against spousal testimony,⁷ one must also look at the seventeenth century rule disqualifying an interested party from testifying in common law courts.⁸ A party to an action could not testify on his own behalf, based on the belief that he would be inclined to commit perjury to further his cause.⁹ Because a husband and wife were considered one person, with no separate legal existence,¹⁰ common law courts extended this disqualification to the party's spouse.¹¹

Despite the demise of both the offense of petit treason and the disqualification for interest, courts continued to exclude the testimony of one spouse for or against the other. Judges were apparently reluctant to abandon the rationales previously asserted in support of spousal incompetence.¹² Some courts justified this disqualification based on the "legal policy of marriage."¹³ Husband and wife were considered "two souls in one person,"¹⁴ their interests were viewed as identical, and the natural bias of spouses was

5. 8 J. WIGMORE, EVIDENCE § 2227 (J. McNaughten rev. 1961) [hereinafter cited as 8 WIGMORE]; Comment, *Questioning the Marital Privilege: A Medieval Philosophy in a Modern World*, 7 CUM. L. REV. 307, 310 (1976) [hereinafter cited as *Questioning*].

6. 1 W. BLACKSTONE, COMMENTARIES *442-45; *Questioning*, *supra* note 5, at 310.

7. 8 WIGMORE, *supra* note 5, § 2227.

8. *See generally* 2 WIGMORE, *supra* note 4, §§ 575-587.

9. *E.g.*, *Coleman's Trial*, 7 Eng. St. Tr. 1, 65 (1678). Dean Wigmore reduced the policy behind the disqualification to the following syllogism:

Total exclusion from the stand is the proper safeguard against a false decision, whenever the persons offered are of a class specially likely to speak falsely; persons having a pecuniary interest in the event of the cause are specially likely to speak falsely; therefore such persons should be totally excluded.

2 WIGMORE, *supra* note 4, § 576.

10. 1 W. BLACKSTONE, COMMENTARIES *442; E. COKE, COMMENTARY UPON LITTLETON *6b; C. McCORMICK, LAW OF EVIDENCE § 66 (2d ed. 1972) [hereinafter cited as McCORMICK]. For an interesting account of the restrictions imposed on marital partners, in general, during the late sixteenth and early seventeenth century in England, see J. WALTHOE, *BARON AND FEME* (London 1700).

11. *See, e.g.*, *Bentley v. Cooke*, 99 Eng. Rep. 729 (K.B. 1784). *See generally* 2 WIGMORE, *supra* note 4, §§ 600-620.

12. *See* 8 WIGMORE, *supra* note 5, § 2228.

13. F. BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS *286; 8 WIGMORE, *supra* note 5, § 2228.

14. "A wife cannot be produced either against or for her husband, *quia sunt duae animae in carne una* . . ." E. COKE, COMMENTARY UPON LITTLETON *6b.

thought to encourage one to commit perjury on the other's behalf.¹⁵ In addition, society had an aversion to the idea of compelling one spouse to testify against the other, thereby subjecting the couple to public humiliation.¹⁶ The courts also feared that any interference on their part might disturb marital harmony and infringe upon the confidential relationship between husband and wife.¹⁷ This final rationale is the one courts continue to assert to justify their application of modern spousal privilege.¹⁸

Common law courts recognized an exception to this exclusionary rule when spousal testimony was a "necessity" for the fair administration of justice.¹⁹ In particular, courts were reluctant to allow a husband "a vested license to injure [his wife] in secret with complete immunity."²⁰ Therefore, a wife was permitted to testify in criminal prosecutions for personal injuries inflicted upon her by her husband.²¹ Furthermore, reasoning that the "tie of allegiance" to the king was "more obligatory than any other,"²² some courts also recognized an exception to the rule in the case of high treason.²³

Spousal incompetence and the exception for necessity survived virtually unchallenged for approximately two hundred years.²⁴ However, Jeremy Bentham, an early critic of this exclusionary rule, forecast the later decline of what he viewed as a

15. See, e.g., *Davis v. Dinwoody*, 100 Eng. Rep. 1241 (K.B. 1792). See also 1 W. BLACKSTONE, COMMENTARIES *443; 2 WIGMORE, *supra* note 4, § 601; Moser, *Compellability of One Spouse to Testify Against the Other in Criminal Cases*, 15 MD. L. REV. 16, 18 (1955); 38 VA. L. REV. 359, 359 (1952).

16. 8 WIGMORE, *supra* note 5, § 2228; *Questioning*, *supra* note 5, at 310.

17. *Stapleton v. Crofts*, 118 Eng. Rep. 137, 138 (1852); 8 WIGMORE, *supra* note 5, § 2228; *Questioning*, *supra* note 5, at 308.

18. See, e.g., *Trammel v. United States*, 445 U.S. 40, 44 (1980); *Harris v. State*, 37 Md. App. 180, 183, 376 A.2d 1144, 1145 (1977). See also McCORMICK, *supra* note 10, § 66; 8 WIGMORE, *supra* note 5, § 2228; Comment, *The Husband-Wife Evidentiary Privilege in Criminal Proceedings*, 52 J. CRIM. L.C. & P.S. 74, 76 (1961) [hereinafter cited as *Husband-Wife*]; *Questioning*, *supra* note 5, at 312-13; 38 VA. L. REV. 359, 361 (1952).

19. 8 WIGMORE, *supra* note 5, § 2239.

20. *Id.*

21. *Id.*; see, e.g., *Dominus Rex v. Azire*, 93 Eng. Rep. 746 (K.B. 1725); *Lord Audley's Trial*, 3 Eng. St. Tr. 401 (K.B. 1631). The court in *Lord Audley's Trial* admitted a wife's testimony to prove the rape upon her at the instigation and with the assistance of her husband, by stating: "[In] civil cases the Wife may not [be a competent witness against her husband]; but in a criminal cause of this nature, where the wife is the party grieved, and on whom the crime is committed, she is to be admitted [as] a witness against her husband." *Id.* at 414.

22. F. BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS *286.

23. *Lady Ivy's Trial*, 10 Eng. St. Tr. 555, 644 (K.B. 1684); F. BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS *286; 8 WIGMORE, *supra* note 5, § 2239. *Contra* Anonymous, 1 Brownl & Gold 47, 123 Eng. Rep. 656 (C.P. 1613).

24. See 8 WIGMORE, *supra* note 5, §§ 2227-2228.

license given to a husband to commit "all sorts of wickedness, in the presence of or with the assistance of his wife . . ." ²⁵ Until society's changing views on marriage and the individual rights of marital partners forced courts to alter the rule, Bentham stood virtually alone in his crusade against securing every man with a "safe accomplice." ²⁶

B. *Changing Attitudes*

The industrial revolution precipitated the breakdown of the family as a self-sufficient socio-economic unit and the dissolution of the bonds that tied husband and wife together in the eyes of the law. ²⁷ A significant step toward the legal and economic autonomy of wives occurred in the mid-nineteenth century when legislatures began to pass Married Women's Property Acts. ²⁸ Shortly thereafter in civil actions ²⁹ and somewhat later in criminal proceedings, ³⁰ the absolute disqualification of a witness-spouse was transformed by most jurisdictions into a narrower privilege.

In more recent years, with the entry of increasing numbers of women into the work force and the disappearance of the stigma previously associated with divorce, ³¹ the fear of disturbing conjugal bliss has become an anachronism. Consequently, in the area of spousal privilege, as with many other archaic rules, ³² courts and legislatures have altered the law in accordance with the changing views of modern society toward the sanctity of the marital relationship.

C. *Rules Excluding Spousal Testimony*

Three distinct rules affect the admissibility of spousal testimony: the total incompetence of a witness-spouse as applied at

25. 5 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 327, 340 (1827). The full passage is as follows:

Let us, therefore, grant to every man a license to commit all sorts of wickedness, in the presence and with the assistance of his wife: let us secure to every man in the bosom of his family, and in his own bosom, a safe accomplice: let us make every man's house his castle; and, as far as depends upon us, let us convert that castle into a den of thieves.

Id.

26. *Id.*

27. V. TUFFLE & B. MYERHOFF, *CHANGING IMAGES OF THE FAMILY* 336 (1979); Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 *MINN. L. REV.* 675, 788-89 (1929).

28. See V. TUFFLE & B. MYERHOFF, *CHANGING IMAGES OF THE FAMILY* 336 (1979). See also I. BAXTER, *MARITAL PROPERTY* §§ 2:1--:3 (1973).

29. *E.g.*, Law of March 2, 1864, ch. 109, §§ 1, 3, 1864 Md. Laws 136.

30. *E.g.*, Law of April 5, 1888, ch. 545, § 1, 1888 Md. Laws 895.

31. V. TUFFLE & B. MYERHOFF, *CHANGING IMAGES OF THE FAMILY* 319-60 (1979); 8 WIGMORE, *supra* note 5, § 2228; Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 *MINN. L. REV.* 675, 678-79 (1929).

32. *E.g.*, *Lusby v. Lusby*, 283 Md. 334, 390 A.2d 77 (1978). For a discussion of *Lusby*, in which the Court of Appeals of Maryland modified the doctrine of interspousal tort immunity, see 8 *U. BALT. L. REV.* 584 (1979).

common law; the privilege against testimony regarding private marital communications; and the privilege against adverse testimony in general (the anti-marital facts privilege). Every state has provided statutory guidance to the courts in their jurisdictions, indicating which of these rules are applicable to exclude spousal testimony.³³ Although these exclusionary rules may serve the substantive goal of promoting marital harmony and confidence, their application often results in the sacrifice of valuable evidence.³⁴ To avoid such sacrifice, courts have created exceptions when necessary,³⁵ and legislatures have modified or abrogated the application of these rules.³⁶

Incompetency and privilege differ both in justification and application.³⁷ A judicial disqualification of a witness, based on his incompetence, is intrinsic to the litigation and conclusively establishes that the witness' testimony can be given no probative value. If the court accepts a party's assertion that a witness is incompetent to testify, his incompetence cannot thereafter be waived. The majority of jurisdictions have rendered spouses fully competent to testify for or against each other in civil cases.³⁸ Furthermore, the disqualification of husbands and wives to testify favorably in criminal proceedings has disappeared entirely.³⁹ Finally, although a few jurisdictions continue to view adverse spousal testimony in criminal cases as incompetent,⁴⁰ the majority of jurisdictions, which have not totally abolished this exclusionary rule,⁴¹ now consider such testimony privileged.⁴² The justification for the application of a privilege is extrinsic to the litigation

33. See statutes compiled in 2 WIGMORE, *supra* note 4, § 488.

34. The Advisory Committee, which developed the proposed Federal Rules of Evidence, recognized that the purpose of privilege rules is "extrinsic to litigation," hampering any determination of truth in order to protect certain confidences and relationships. 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 501[01], at 501-13 (1979); Nacht, *Privileges in the Federal Courts—The Two Faces of Rule 501*, 1978 ANN. SURVEY AM. L. 493, 493-94.

35. See text accompanying notes 155-72 *infra*.

36. See 2 WIGMORE, *supra* note 4, § 488.

37. For a discussion of the distinction between a rule of incompetency and a rule of privilege, see McCORMICK, *supra* note 10, §§ 72-74.

38. See 2 WIGMORE, *supra* note 4, § 488.

39. McCORMICK, *supra* note 10, § 66.

40. Seven states continue to view spouses as incompetent to testify adversely. *Trammel v. United States*, 445 U.S. 40, 48-49 n.9 (1980); 2 WIGMORE, *supra* note 4, § 488. It should be noted, although *Trammel* lists eight states, Mississippi was included despite the fact that spouses may testify if both consent. MISS. CODE ANN. § 13-1-5 (Supp. 1979).

41. For a list of the states that have abolished the rule against adverse spousal testimony, see *Trammel v. United States*, 445 U.S. 40, 48-49 n.9 (1980). See also 2 WIGMORE, *supra* note 4, § 488.

42. Twenty-five states recognize an anti-marital facts privilege. See *Trammel v. United States*, 445 U.S. 40, 48-49 n.9 (1980); 2 WIGMORE, *supra* note 4, § 488.

inasmuch as it is based on the desire of courts or legislatures to protect certain relationships and confidences.⁴³ Therefore, a husband or wife vested with a spousal privilege can normally waive it.⁴⁴ It should be noted, however, that confusion between spousal privilege and incompetence has, on occasion, caused courts to question the possibility of waiver.⁴⁵

The privilege against disclosure of confidential marital communications is the most widely accepted of the rules on spousal testimony.⁴⁶ Although this privilege existed as early as the seventeenth century,⁴⁷ it was not consistently applied until nineteenth century legislatures began to abolish the disqualification of a witness-spouse.⁴⁸ It is now applied in every state and federal court in the United States, even in jurisdictions in which the more general privilege against adverse spousal testimony has been abrogated.⁴⁹

Generally, a confidential communication is a written or oral statement from one spouse to the other, made with the assurance that it will be protected by the intimacy of the marital state.⁵⁰ Although the majority of jurisdictions limit the privilege to oral or written expressions, some courts have extended the rule to include acts, when the information thereby conveyed would not have been obtained but for the marital relationship.⁵¹ Moreover, a presumption exists that any communication made between a husband and wife during the marriage is privileged.⁵² Normally, only the presence of a third party or other circumstances negating the confidential nature of the communication can be offered to rebut that presumption.⁵³

Although virtually all jurisdictions concur that the communicating spouse holds the confidential communications privilege,⁵⁴ those jurisdictions still recognizing an anti-marital facts

43. McCORMICK, *supra* note 10, § 72.

44. 8 WIGMORE, *supra* note 5, § 2242; *Husband-Wife*, *supra* note 18, at 83.

45. See McCORMICK, *supra* note 10, §§ 72, 83.

46. See *Questioning*, *supra* note 5, at 311-12. See also 2 WIGMORE, *supra* note 4, § 488.

47. *Lady Ivy's Trial*, 10 Eng. St. Tr. 555, 644 (K.B. 1684).

48. McCORMICK, *supra* note 10, § 78; 8 WIGMORE, *supra* note 5, § 2333.

49. See 2 WIGMORE, *supra* note 4, § 488.

50. 38 VA. L. REV. 359, 361 (1952).

51. For a discussion of when an act constitutes a communication, see 8 WIGMORE, *supra* note 5, § 2337; *Husband-Wife*, *supra* note 18, at 78-79; Comment, *Privileged Communications between Husband and Wife: Extension of the Privilege to Acts in Criminal Cases*, 47 J. CRIM. L.C. & P.S. 205 (1956).

52. *Blau v. United States*, 340 U.S. 332, 333 (1951); *Coleman v. State*, 281 Md. 538, 543, 380 A.2d 49, 52 (1977); McCORMICK, *supra* note 10, § 80.

53. *E.g.*, *Pereira v. United States*, 347 U.S. 1 (1953); *Master v. Master*, 223 Md. 618, 166 A.2d 251 (1960).

54. McCORMICK, *supra* note 10, § 83; 8 WIGMORE, *supra* note 5, § 2340.

privilege disagree as to who has standing to raise it.⁵⁵ The modern trend favors vesting the privilege in the witness-spouse; however, many states continue to follow the traditional procedure of allowing the defendant-spouse or both to claim the privilege.⁵⁶

While privileged communications made during the marriage remain privileged after divorce or death of the communicating spouse,⁵⁷ the anti-marital facts privilege does not survive the termination of the marital relationship.⁵⁸ The duration of the former privilege is extended, based on the belief that in order to encourage marital confidences, generally, it is necessary that a communicating spouse be guaranteed permanent secrecy.⁵⁹ On the other hand, the anti-marital facts privilege, aimed at preserving domestic peace between the accused and witness-spouse,⁶⁰ understandably terminates when the protected relationship no longer exists.⁶¹

Almost every jurisdiction has expanded the common law exception for "necessity."⁶² Depending on the state, spousal testimony is permitted and may even be compelled⁶³ in such areas as crimes against the person and property of the other spouse, crimes against the child of either or both, bigamy, rape, adultery, and abandonment.⁶⁴

Maryland, by legislative action,⁶⁵ and the federal courts, through judicial interpretation of the changing common law,⁶⁶ have followed the modern evolutionary trend by significantly limiting the exclusion of spousal testimony.

55. *Trammel v. United States*, 445 U.S. 40, 48-49 n.9 (1980); 8 WIGMORE, *supra* note 5, § 2241.

56. Moser, *Compellability of One Spouse to Testify Against the Other in Criminal Cases*, 15 MD. L. REV. 15, 19 (1955); *Husband-Wife*, *supra* note 18, at 82-83.

57. McCORMICK, *supra* note 10, § 85; 8 WIGMORE, *supra* note 5, § 2237; *Husband-Wife*, *supra* note 18, at 79.

58. 8 WIGMORE, *supra* note 5, § 2237; *Husband-Wife*, *supra* note 18, at 77.

59. 8 WIGMORE, *supra* note 5, § 2341.

60. See, e.g., *Trammel v. United States*, 445 U.S. 40, 44 (1980); *Harris v. State*, 37 Md. App. 180, 183, 376 A.2d 1144, 1145 (1977). See also McCORMICK, *supra* note 10, § 66; 8 WIGMORE, *supra* note 5, § 2228; *Husband-Wife*, *supra* note 18, at 76; *Questioning*, *supra* note 5, at 312-13; 38 VA. L. REV. 359, 361 (1952).

61. 8 WIGMORE, *supra* note 5, § 2237; *Husband-Wife*, *supra* note 18, at 77.

62. See 2 WIGMORE, *supra* note 4, § 488; 8 WIGMORE, *supra* note 5, § 2239; *Husband-Wife*, *supra* note 18, at 82-83.

63. See Moser, *Compellability of One Spouse to Testify Against the Other in Criminal Cases*, 15 MD. L. REV. 15, 16 (1955).

64. See 8 WIGMORE, *supra* note 5, § 2239; 38 VA. L. REV. 359, 364-65 (1952).

65. See MD. CTS. & JUD. PROC. CODE ANN. §§ 9-101, -105 to -106 (1980); MD. CODE PUB. GEN. LAWS art. 35, §§ 1, 4 (1904); Law of April 5, 1888, ch. 545, § 1, 1888 Md. Laws 895; Law of March 2, 1864, ch. 109, §§ 1, 3, 1864 Md. Laws 136.

66. See *Wolfe v. United States*, 291 U.S. 7, 12 (1934); FED. R. EVID. 501.

III. SPOUSAL TESTIMONY IN MARYLAND

Although early Maryland courts disqualified one spouse from testifying for or against the other on policy grounds,⁶⁷ by the beginning of the twentieth century the state legislature had statutorily rendered husbands and wives competent in both civil and criminal proceedings.⁶⁸ Nevertheless, a spouse continued to be viewed as incompetent to reveal information obtained in private marital communications⁶⁹ and could not be compelled to testify in a criminal action.⁷⁰ Except for the addition of a statutory exception compelling a husband or wife to testify in a prosecution for the abuse of a minor child,⁷¹ the Maryland rules on the admissibility of spousal testimony have remained, for the most part, substantively unchanged since that time.⁷²

A. *Anti-Marital Facts Privilege*

Maryland vests the anti-marital facts privilege in the witness-spouse. Section 9-106 of the Courts and Judicial Proceedings Code Annotated provides that in a criminal action against one spouse, the other "may not be compelled to testify as an adverse witness unless the charge involves the abuse of a child under 18."⁷³ Therefore, in most criminal cases, when one marital partner

67. *Redgrave v. Redgrave*, 38 Md. 93, 96 (1873); *Williamson v. Morton*, 2 Md. Ch. 94, 107 (1851).

68. Pursuant to chapter 109 of the 1864 Maryland Laws, a party's spouse was rendered competent to testify in civil proceedings. Law of March 2, 1864, ch. 109, §§ 1, 3, 1864 Md. Laws 136. In 1888, the disqualification was expressly removed in criminal cases. Law of April 5, 1888, ch. 545, § 1, 1888 Md. Laws 895. Although chapter 357 of the 1876 Maryland Laws had already implicitly removed this disqualification, the Court of Appeals of Maryland had continued to view spouses as incompetent in criminal proceedings, "based upon considerations of public policy, growing out of the marital relation." *Turpin v. State*, 55 Md. 462, 475-78 (1881). See Law of April 7, 1876, ch. 357, § 1, 1876 Md. Laws 601. It should be noted that the statute that rendered spouses competent did not affect the common law rule that a husband or wife is disqualified from testifying that children born during the marriage are illegitimate, *i.e.*, non access by husband. *Metzger v. Steamship Kirsten Torm*, 245 F.Supp. 227, 233 (D. Md. 1965); *Harward v. Harward*, 173 Md. 339, 139 A. 318 (1938).

69. "[I]n no case, civil or criminal, shall any husband or wife be competent to disclose any confidential communication made by one to the other during the marriage . . ." MD. CODE PUB. GEN. LAWS art. 35, § 4 (1904).

70. *Richardson v. State*, 103 Md. 112, 117, 63 A. 317, 319-20 (1906). Note, however, that the statute in effect at that time did not indicate that a spouse was not compellable. MD. CODE PUB. GEN. LAWS art. 35, §§ 1, 4 (1904). In 1964, the Maryland legislature amended that statute to include the phrase "nor shall the husband or wife be compelled to testify as an adverse party or witness in any criminal proceeding involving his or her spouse . . ." Law of May 4, 1965, ch. 835, § 1, 1965 Md. Laws 1322.

71. MD. CTS. & JUD. PROC. CODE ANN. § 9-106 (1980), *applied in* *Mulligan v. State*, 6 Md. App. 600, 252 A.2d 476 (1969).

72. Compare MD. CTS. & JUD. PROC. CODE ANN. §§ 9-101, -105 to -106 (1980) with MD. CODE PUB. GEN. LAWS art. 35, §§ 1, 4 (1904).

73. MD. CTS. & JUD. PROC. CODE ANN. § 9-106 (1980).

takes the stand against the other, the trial judge should probably advise the witness-spouse of his right to refuse to testify.⁷⁴

Almost all of the Maryland case law on the anti-marital facts privilege has dealt with whether an exception existed in a particular factual setting. One such exception urged upon the courts has been that husbands and wives should be compellable witnesses in prosecutions for spousal assault. Unlike the approach in other jurisdictions, Maryland courts have never required spouses to testify in such cases.⁷⁵ The only exception specified in the Maryland Code and, thereby, recognized by the courts is that one spouse may be compelled to testify when the other has allegedly abused a minor child.⁷⁶ The Court of Special Appeals of Maryland applied this statutory exception in *Mulligan v. State*.⁷⁷ In that case, the accused's wife was a compellable witness at her husband's trial for the alleged murder of their soon to be adopted daughter. The court readily extended the statutory exception for abuse⁷⁸ to a prosecu-

74. In *Raymond v. State*, 195 Md. 126, 72 A.2d 711 (1950), however, the Court of Appeals of Maryland indicated that a trial court's failure to properly instruct a witness-spouse, in such a case, does not justify habeas corpus relief. In *Raymond*, a husband petitioned for habeas corpus after he had been convicted of assault and battery upon his wife, based largely upon her testimony. In his petition, he objected to the trial judge's failure to inform his wife of her privilege not to testify. Judge Moser of the Supreme Bench of Baltimore City released the petitioner stating, "I think it is an obligation on the part of the Court to advise the wife it is her free choice to decide whether she wants to testify or not." *Id.* at 128, 72 A.2d at 712. The Court of Appeals of Maryland reversed, concluding that if the trial court erred, the petitioner could not rely on that error because the privilege belonged to his wife alone. The court stated: "[W]here no fundamental right of the petitioner is involved, questions relating to the admissibility of evidence can only be raised on direct appeal, rather than by a habeas corpus proceeding." *Id.* at 130, 72 A.2d at 713.

75. In *Hanon v. State*, 63 Md. 123 (1885), the court of appeals stated that "[t]he necessity of permitting the wife to testify against her husband springs from the duty of protecting her person from violence, and the impunity with which from the privacy and close relations of married life assaults upon her might otherwise be perpetrated." *Id.* at 127. Once the bar of incompetence was removed, however, such permission was unnecessary. This exception was never viewed by Maryland courts, based on their interpretation of the statutory prohibition against compelling spouses to testify in criminal proceedings, as grounds for compelling such testimony in a case of spousal assault. See, e.g., *Metz v. State*, 9 Md. App. 15, 262 A.2d 331 (1970).

76. MD. CTS. & JUD. PROC. CODE ANN. § 9-106 (1980). The statutory exception involves "a child under 18" and does not, as in other jurisdictions, require the child to be related to either the defendant or witness-spouse. Compare *id.* with 2 WIGMORE, *supra* note 4, § 488.

77. 6 Md. App. 600, 252 A.2d 476 (1969).

78. The statutory exception that allowed a court to compel a spouse's testimony then read: "except when such proceedings involves [sic] the abuse of a child under sixteen years pursuant to Section 11A of Article 27 of this Code, as amended from time to time . . ." Law of April 14, 1967, ch. 176, § 1, 1967 Md. Laws 291, quoted in *Mulligan v. State*, 6 Md. App. 600, 615, 252 A.2d 476, 485 (1969).

tion for murder due to the fact that the defendant's "malicious mistreatment" of the child was found to have caused her death.⁷⁹ His actions were therefore among those prohibited under the Maryland child abuse statute.⁸⁰

Although Maryland courts may not compel spousal testimony in cases not involving child abuse, such evidence may be admitted through another source. For example, in *Metz v. State*,⁸¹ the court of special appeals ruled that voluntary statements offered by a wife to the police concerning her husband's assault upon her were admissible, despite the fact that she had asserted her privilege not to testify in court. The court strictly construed the language of the statute "to mean exactly what it says, that a husband or wife shall not be compelled 'to testify as an adverse party or witness.'"⁸²

B. *Privileged Communications*

Section 9-105 of the Maryland Courts and Judicial Proceedings Code Annotated provides that husbands and wives are incompetent to testify to any confidential communication that occurred between them during their marriage.⁸³ The statute does not define the phrase "confidential communication," nor does it list any exceptions. Furthermore, the legislature's use of the word "incompetent" raises questions as to the possibility of waiver.⁸⁴

By resorting to the common law, the Court of Appeals of Maryland has resolved some of the questions raised by the ambiguity of the statute. The court follows the generally accepted rule that any communication between husband and wife made during the marriage is presumed privileged.⁸⁵ The presumption of confidentiality may be overcome, however, by evidence that a third

79. Article 27, § 11A of the Maryland Annotated Code subjects a person responsible for the supervision of a child, who causes injury by his malicious mistreatment of that child, to criminal liability for child abuse. MD. ANN. CODE art. 27, § 11A (1976). The court did not believe that the legislature could have intended to limit the compellability of a spouse's testimony to prosecution for abuse under that statute. 6 Md. App. 600, 615-17, 252 A.2d 476, 485 (1969).

80. 6 Md. App. 600, 615-17, 252 A.2d 476, 485 (1969); see MD. ANN. CODE art. 27, § 11A (1976).

81. 9 Md. App. 15, 262 A.2d 331 (1970).

82. *Id.* at 19, 262 A.2d at 333 (emphasis in original).

83. MD. CTS. & JUD. PROC. CODE ANN. § 9-105 (1980).

84. Law of August 22, 1973, ch. 2, § 9-106, 1973 Md. Laws Sp. Sess. 284 (revisor's note). See text accompanying notes 37-45 *supra*.

85. *Coleman v. State*, 281 Md. 538, 543, 380 A.2d 49, 52 (1977).

party was made privy to the communication.⁸⁶ The court of appeals has justified its application of the privilege by asserting:

(1) that the communications originate in confidence, (2) the confidence is essential to the relation, (3) the relation is a proper object of encouragement by the law, and (4) the injury that would inure to it by the disclosure is probably greater than the benefit that would result in the judicial investigation of truth.⁸⁷

To compare the traditional and liberal views of what constitutes a privileged communication, one need look no further than the decisions of the Court of Appeals and the Court of Special Appeals of Maryland. In *Gutridge v. State*,⁸⁸ the court of appeals held that a spouse must intend to convey information to engage in a confidential communication. In *Gutridge*, a husband attempted to foreclose his wife from testifying that he had placed a key to a locker containing narcotics in her purse. The court of appeals concluded that the dropping of his keys in her handbag could not be considered a communication. Observing that no information was transmitted along with the act, the court believed that, even viewed liberally, the privilege would not apply.⁸⁹ Although the court of appeals did not affirmatively state that it would be unwilling to view an act as a communication in future cases, based on *Gutridge*, it appears unlikely that the privilege will be extended to acts that are unaccompanied by oral or written expressions conveying some information.

In *Coleman v. State*,⁹⁰ the defendant's wife testified, over his objection, to the substance of a telephone call from him after he had been arrested for perverted sexual practices. Gloria McCue, another prosecution witness who had been present during the crime, testified that she had placed a ring, stolen from the victim, in Coleman's apartment at his request. Mrs. Coleman revealed at trial that her husband, fearing that the ring would be used as evidence against him, phoned her from jail requesting that she recover it from his apartment. After the defendant's wife obtained possession of the ring, she turned it over to the police.

The Court of Special Appeals of Maryland affirmed Coleman's

86. See *id.* at 543, 380 A.2d at 53; *Gutridge v. State*, 236 Md. 514, 516, 204 A.2d 557, 559 (1964); *Master v. Master*, 223 Md. 618, 166 A.2d 251 (1960). In *Master*, a wife was permitted to testify to a statement made by her husband in the presence of their children who were old enough to fully understand what was being said. The fact that they were able to overhear the conversation rebutted the presumption that the marital communication was confidential and privileged. See *id.* at 623-24, 166 A.2d at 256.

87. *Coleman v. State*, 281 Md. 538, 541, 380 A.2d 49, 51-52 (1977).

88. 236 Md. 514, 204 A.2d 557 (1964).

89. *Id.* at 516, 204 A.2d at 559.

90. 35 Md. App. 208, 370 A.2d 174, *rev'd*, 281 Md. 538, 380 A.2d 49 (1977).

conviction, concluding that the communication between the defendant and his wife was not privileged.⁹¹ The decision was based on the court's belief that the telephone conversation was not intended to be confidential,⁹² that the relationship between the couple did not constitute a marriage worthy of protection,⁹³ and that the privilege did not apply when the communication was made in furtherance of a crime.⁹⁴

The court of appeals reversed, holding that there had been insufficient evidence to rebut the presumption that the communication was privileged.⁹⁵ Furthermore, the court indicated that the application of the privilege is not dependent upon the stability of the marriage. Finally, although other jurisdictions statutorily provide that a marital communication is not privileged when made in furtherance of a crime,⁹⁶ the court refused to adopt that exception without legislative sanction.⁹⁷ To the contrary, the nature of the discussion between Coleman and his wife indicated to the court that the communication was intended to be confidential.⁹⁸

Three months before the court of appeals rendered its decision in *Coleman*,⁹⁹ the court of special appeals decided *Harris v. State*.¹⁰⁰ The trial record in that case indicated that the defendant had been informed that a relationship existed between his wife and a man named Smith. Mrs. Harris testified that her husband threatened her into disclosing where Smith lived. She further revealed that after the defendant procured his shotgun, she drove him to Smith's home in her car, at which time her husband told her to pull over in front of his residence and blow the horn. After she jumped from the car, a gun battle allegedly took place.¹⁰¹ Mr. Harris was convicted of assault with intent to murder and of carrying a dangerous weapon openly with intent to injure.¹⁰²

91. *Id.*

92. The Court of Special Appeals of Maryland found the telephone conversation not to be confidential because Gloria McCue was privy to the details concerning the ring, and Mrs. Coleman would have needed to contact her to obtain it. *Id.* at 212-14, 370 A.2d at 177-78.

93. Mrs. Coleman testified that her marriage to the appellant was "completely a business arrangement" to entitle her child to support payments after Coleman's anticipated enlistment in the army. *Id.* at 214, 370 A.2d at 178.

94. *Id.* at 214-16, 307 A.2d at 178-79.

95. 281 Md. 538, 544, 380 A.2d 49, 53 (1977).

96. *E.g.*, CAL. EVID. CODE § 981 (West 1966), cited in *Coleman v. State*, 35 Md. App. 208, 216, 370 A.2d 174, 179, *rev'd*, 281 Md. 538, 380 A.2d 49 (1977).

97. 281 Md. 538, 546-47, 380 A.2d 49, 54-55 (1977).

98. *Id.* at 544, 380 A.2d at 53.

99. The court of appeals' decision in *Coleman v. State*, 281 Md. 538, 380 A.2d 49 (1977), was rendered on December 8, 1977.

100. 37 Md. App. 180, 376 A.2d 1144 (1977). *Harris* was decided by the Court of Special Appeals of Maryland on September 8, 1977.

101. *Id.* at 182-83, 376 A.2d at 1144-45.

102. *Id.* at 181, 376 A.2d at 1144.

On appeal, Harris asserted that the trial court had erred in admitting his wife's testimony concerning the conversation between them before and during their drive to the victim's home.¹⁰³ The court of special appeals affirmed the conviction, holding that the statute protecting confidential communications is inapplicable in the case of threatening statements because such statements are inherently destructive of the marital harmony and tranquility the statute seeks to preserve.¹⁰⁴ A petition for certiorari to the court of appeals was never made.

It is questionable whether the court of appeals would have affirmed the holding in *Harris*, based on its later reversal of the court of special appeals' decision in *Coleman v. State*.¹⁰⁵ In *Coleman*, the court of appeals indicated that "a court may not as a general rule surmise a legislative intention contrary to the plain language of a statute or insert exceptions not made by the legislature."¹⁰⁶ The court was convinced that if any exceptions under the statute on privileged communications had been intended, the legislature would have expressed them, as has been done with other statutory privileges.¹⁰⁷ Consequently, the *Harris* exception in the case of threatening statements by a spouse is of questionable validity.

It should be noted, however, that *Harris* and *Coleman* are distinguishable, and it is possible that the court of appeals, if given the opportunity, might have affirmed the *Harris* decision on other grounds. In *Coleman*, the defendant revealed to his wife the location of incriminating evidence, clearly intending the communication with her to be confidential.¹⁰⁸ The only way the court of special appeals could affirm the admission of her testimony was to fashion an exception to the statute, thereby invading the province of the legislature and subjecting its decision to reversal by the court of appeals. On the other hand, in *Harris*, the defendant's communicative intent was less clear. In coercing his wife to direct him to the victim's home, he was not imparting a confidential matter, but forcing her to reveal such information. In doing so, he was

103. Harris contended that the conversations between his wife and himself were protected under § 9-105 of the Courts and Judicial Proceedings Code Annotated. *Id.* at 183, 376 A.2d at 1145. That statute provides: "One spouse is not competent to disclose any confidential communication between the spouses occurring during their marriage." MD. CTS. & JUD. PROC. CODE ANN. § 9-105 (1980).

104. 37 Md. App. 180, 185, 376 A.2d 1144, 1146 (1977).

105. 281 Md. 538, 380 A.2d 49 (1977).

106. *Id.* at 546, 380 A.2d at 54.

107. The court noted that the Maryland legislature had expressly stated exceptions to both the psychiatrist-patient and attorney-client privileges. *See* MD. CTS. & JUD. PROC. CODE ANN. §§ 9-109, -110(b) (1980), *cited in* *Coleman v. State*, 281 Md. 538, 546, 380 A.2d 49, 54 (1977).

108. *See* text accompanying note 98 *supra*.

not relying on the sanctity of the marital relationship; he was acting to destroy it.¹⁰⁹ Although finding precedent for exceptions to the statute in its prior decision in *Coleman*,¹¹⁰ the court of special appeals in *Harris* also discussed whether the defendant's threatening statements fell within the definition of the statutorily undefined phrase "confidential communications."¹¹¹ Based on *Gutridge*,¹¹² the court could conceivably have concluded that the threatening statements made by Harris to his wife were not intended to convey any information to her and, thereby, were not subject to protection under the statute.

Neither the legislature nor the courts of Maryland have addressed the issue of waiver with respect to confidential communications. There would appear to be no reason to preclude one marital partner from revealing the substance of a conversation with the other in a case in which the communicating spouse has consented to the disclosure. The choice of the term "incompetent" rather than "privileged" in the statute on confidential communications, however, raises doubts as to the possibilities of such waiver.¹¹³

IV. SPOUSAL TESTIMONY IN THE FOURTH CIRCUIT

Any definitive statement as to the admissibility of spousal testimony in the Fourth Circuit is difficult to make, by virtue of the limited number of decisions made by the court of appeals on the issue and the lack of specificity in the federal rule governing privilege.¹¹⁴ While some guidance as to the applicability of an anti-marital facts privilege can be found in the Supreme Court's 1980 decision, *Trammel v. United States*,¹¹⁵ the Supreme Court has provided no recent precedent defining the scope of privileged marital communications.¹¹⁶

109. See *Dowdy v. State*, 194 Tenn. 212, 250 S.W.2d 78 (1952); text accompanying note 50 *supra*.

110. Although the court of special appeals cited the following authorities: *Gutridge v. State*, 236 Md. 514, 204 A.2d 557 (1964); *People v. Fields*, 31 N.Y.2d 713, 289 N.E.2d 557, 337 N.Y.S.2d 517 (1972); *Wheeler v. State*, 220 Tenn. 155, 415 S.W.2d 121 (1967), the court apparently relied on its prior holding in *Coleman* to support its decision. See *Harris v. State*, 37 Md. App. 180, 184, 376 A.2d 1144, 1146 (1977). Furthermore, the *Gutridge* passage, quoted by the *Harris* court, was taken out of context and did not, as the court of special appeals stated, indicate the court of appeals' approval of "relaxing the strict rule rendering spouses incompetent to testify with respect to confidential communications . . ." *Id. Compare* *Gutridge v. State*, 236 Md. 514, 517, 204 A.2d 557, 559 (1964) *with* *Harris v. State*, 37 Md. App. 180, 184, 376 A.2d 1144, 1146 (1977).

111. *Harris v. State*, 37 Md. App. 180, 182-83, 376 A.2d 1144, 1146 (1977).

112. See text accompanying notes 88-89 *supra*.

113. Law of August 22, 1973, ch. 2, § 9-106, 1973 Md. Laws Sp. Sess. 284 (revisor's note).

114. See text accompanying notes 139-41 *infra*.

115. 445 U.S. 40 (1980).

116. See text accompanying note 192 *infra*.

A. *Anti-Marital Facts Privilege*

Relying on early Supreme Court decisions,¹¹⁷ the United States Court of Appeals for the Fourth Circuit originally disqualified one spouse from testifying for or against the other.¹¹⁸ In *Dowdy v. United States*,¹¹⁹ the wife of a criminal defendant, accused of conspiring to violate the prohibition laws, was disqualified from testifying on behalf of her husband or his alleged co-conspirator. The court reasoned that it was bound to observe the rule of spousal incompetence, "so long deemed settled," until the Supreme Court ruled otherwise.¹²⁰

On certiorari to the Supreme Court, this Fourth Circuit case, renamed *Funk v. United States*,¹²¹ resulted in the abrogation of spousal incompetence. The Supreme Court asserted that "[t]he public policy of one generation may not, under changed conditions, be the public policy of another. . . . The fundamental basis upon which all rules of evidence must rest — if they are to rest upon reason — is their adaptation to the successful development of the truth."¹²² Absent federal legislation to the contrary, the Court held that the favorable testimony of a witness-spouse could no longer be viewed as incompetent. The *Funk* Court gave no indication, however, whether and under what conditions adverse spousal testimony would be admissible.¹²³

Subsequent to the *Funk* opinion, decisions on the admissibility of spousal testimony varied from one federal jurisdiction to another.¹²⁴ Consequently, in 1958 the Supreme Court in *Hawkins v. United States*¹²⁵ rendered its first clear-cut ruling on the issue. In *Hawkins*, the trial court had allowed a wife to testify, over her husband's objection, that he had transported a girl over state lines for the purposes of prostitution, in violation of the Mann Act.¹²⁶ On certiorari to the Supreme Court, the Government argued that although one spouse should not be compelled to testify against the other, the testimony should be admitted when offered voluntarily by the witness-spouse.¹²⁷ It was asserted that when a husband or wife is willing to so testify, it is a strong indication that

117. *E.g.*, *Jin Fuey Moy v. United States*, 254 U.S. 189 (1920); *Stein v. Bowman*, 38 U.S. (13 Pet.) 209 (1839).

118. *See Fisher v. United States*, 32 F.2d 602, 604 (4th Cir. 1929); *Barton v. United States*, 25 F.2d 967, 967 (4th Cir. 1928); *Krashowitz v. United States*, 282 F. 599, 601 (4th Cir. 1922).

119. 46 F.2d 417 (4th Cir. 1931), *rev'd sub nom. Funk v. United States*, 290 U.S. 371 (1933).

120. *Id.* at 421.

121. 290 U.S. 371 (1933).

122. *Id.* at 381.

123. The Court in *Funk* limited its ruling to favorable spousal testimony. *See id.* at 373.

124. *Compare United States v. Mitchell*, 137 F.2d 1006 (2d Cir. 1943), *cert. denied*, 321 U.S. 794 (1944) with *Yoder v. United States*, 80 F.2d 665 (10th Cir. 1935).

125. 358 U.S. 74 (1958).

126. *Id.* at 74-75.

127. *Id.* at 77.

the marriage, which the rule seeks to preserve, is no longer worthy of protection. Rejecting this argument, the Court reasoned that the exclusion by one spouse of the other's adverse testimony benefited not only the family involved, but the public as well. Furthermore, the Court failed to see how family harmony would be less disturbed by a wife's voluntary testimony against her husband than by her compelled testimony.¹²⁸ Although concluding that a witness-spouse's testimony was not admissible over the objection of an accused-spouse, the court noted that the decision was not intended to foreclose future changes in the rule, which might "eventually be dictated by 'reason and experience.'" ¹²⁹

The *Hawkins* decision indicated that the common law disqualification had evolved into a rule barring the testimony of one spouse against the other without their mutual consent.¹³⁰ The Supreme Court provided additional support for the view that either spouse had standing to claim the privilege against adverse testimony in *Wyatt v. United States*.¹³¹ In that case, the Court stated that "[w]hile the defendant-husband is entitled to be protected against condemnation through the wife's testimony, the witness-wife is also entitled to be protected against becoming the instrument of that condemnation, — the sentiment in each case being equal in degree and yet different in quality."¹³²

The United States Court of Appeals for the Fourth Circuit went one step further in *Mills v. United States*,¹³³ by concluding that a witness-spouse could not be compelled by the accused to give even allegedly favorable testimony in a criminal case against him. Citing *Hawkins*, the court reasoned that because the wife of the accused stated that she did not wish to testify either for or against her husband, the trial court would have been "treading on dangerous ground" in compelling her testimony.¹³⁴ It has been questioned whether there was, in fact, any historical precedent for that ruling.¹³⁵

128. *Id.*

129. *Id.* at 79. *Wolfe v. United States*, 291 U.S. 7 (1934), was the first case to establish that the competency of witnesses in the federal courts is to be "governed by common law principles as interpreted and applied . . . in the light of reason and experience." *Id.* at 12. This standard was adopted in both rule 26 of the Federal Rules of Criminal Procedure and rule 501 of the Federal Rules of Evidence.

130. 358 U.S. 74, 78 (1958).

131. 362 U.S. 525 (1960).

132. *Id.* at 529 (quoting 8 WIGMORE, *supra* note 5, § 2241).

133. 281 F.2d 736 (4th Cir. 1960).

134. *Id.* at 740. Both *Hawkins* and *Wyatt* spoke only to the witness-spouse's privilege against adverse spousal testimony. *Mills* did not mention *Wyatt*, which was decided three months earlier.

135. C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 405, at 83-84 n.9 (1969). Although at trial Ms. Mills based her refusal to testify on spousal privilege, the trial court advised her that she need not testify if her testimony might incriminate her. *Mills v. United States*, 281 F.2d 736, 740 (4th Cir. 1960). Professor Wright, in his criticism of the *Mills* decision, indicated that the privilege against self-incrimination provided a sounder basis for allowing Ms. Mills to avoid testifying. C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 405, at 83-84 n.9 (1969).

In 1972, the Supreme Court promulgated a proposed draft of the Federal Rules of Evidence, including detailed rules on privilege, for congressional approval.¹³⁶ Proposed rule 505 would have excluded spousal testimony in criminal proceedings when the privilege was invoked by a defendant or by the witness-spouse on his behalf.¹³⁷ The latter was presumed to have the consent of the accused "in the absence of evidence to the contrary."¹³⁸ The specific privilege rules, however, including rule 505, were rejected by Congress in favor of a general provision, rule 501.¹³⁹ Pursuant to this rule, for the most part,¹⁴⁰ state law is to be applied in diversity cases, and in federal question cases the courts are to apply "the principals of common law as they may be interpreted . . . in the light of reason and experience."¹⁴¹

In February 1980, the Supreme Court was presented with the same argument that it had previously rejected in *Hawkins* to support the admission of a witness-spouse's voluntary testimony. *Trammel v. United States*¹⁴² concerned the involvement of a husband, wife, and others in the importation of heroin.¹⁴³ After the Government granted Mrs. Trammel use immunity, she testified

136. 56 F.R.D. 183 (1973); 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE §§ 501-513 (1979); Nacht, *Privileges in the Federal Courts — The Two Faces of Rule 501*, 1978 ANN. SURVEY AM. L. 493, 493-94.

137. 56 F.R.D. 183, 244 (1973).

138. *Id.*

139. Rule 501 reads as follows:

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

FED. R. EVID. 501.

140. In a diversity case in which no federal claim is involved, state privilege rules are applied. In a federal question case, which raises no state issues, the court resorts to federal privilege law. In a "mixed case," however, the controlling law is less clear. For a thorough discussion of this topic, see Nacht, *Privileges in the Federal Courts — The Two Faces of Rule 501*, 1978 ANN. SURVEY AM. L. 493, 496-502.

141. FED. R. EVID. 501. See note 139 *supra*.

142. 445 U.S. 40 (1980).

143. Petitioner Otis Trammel was indicted on March 10, 1976, along with Edwin Lee Roberts and Joseph Freeman, for importing heroin from Thailand and the Philippine Islands and conspiring to import heroin in violation of 21 U.S.C. §§ 952(a), 962(a) and 963. Petitioner's wife, Elizabeth Trammel, and six others were named as unindicted co-conspirators. It was alleged that the petitioner and his wife in August 1975 carried a quantity of heroin with them on a flight from the Philippines to California. Following Freeman and Roberts' assistance of the couple in distribution, Elizabeth Trammel purchased an additional supply of the drug in Thailand. On her return flight to the United States, during a routine customs search in Hawaii, four ounces of heroin were found on her person, and she was arrested. 445 U.S. 40, 42 (1980).

concerning the role of herself and her spouse in the illegal activities charged.¹⁴⁴ The only limitation placed on her testimony at trial was that she could not relate any information that she had obtained by virtue of a confidential communication with her husband.¹⁴⁵ He was thereafter convicted based almost entirely on her testimony.¹⁴⁶ The United States Court of Appeals for the Tenth Circuit affirmed, rejecting Trammel's assertion that, based on *Hawkins*, his wife's adverse testimony should not have been admitted over his objection.¹⁴⁷ The Supreme Court granted certiorari and overruled its prior decision in *Hawkins*, concluding that "reason and experience no longer justif[ied] so sweeping a rule"¹⁴⁸

Recognizing that testimonial exclusionary rules contravene the public's right to every man's evidence, the Court examined the rationales previously espoused in support of the anti-marital facts privilege.¹⁴⁹ The early disqualification, based on the legal unity of husband and wife, was rejected as having no contemporary justification.¹⁵⁰ The modern theory that spousal testimony should be excluded to foster the harmony and sanctity of the marital relationship was also discarded. The Court concluded that the willingness of one spouse to testify against the other in a criminal proceeding indicates that there is probably little marital harmony to preserve.¹⁵¹ Furthermore, the Court believed that allowing an accused to foreclose his spouse from testifying in a case in which she was allegedly involved in the crime could in itself damage the relationship by depriving her of the ability to obtain immunity from prosecution in return for her cooperation.¹⁵²

A comparison was made between the testimonial exclusionary rules for spouses and those the federal courts recognize in the relationships of attorney-client, priest-penitent, and physician-patient. In contrast to the expansive scope of the spousal privileges, the latter privileges were noted to be restricted to information obtained in confidential communications.¹⁵³ The Court was

144. 445 U.S. 40, 42-43 (1980).

145. Before trial, petitioner moved to sever his case from that of Freeman and Roberts, based on his privilege to prevent his wife, whom the government intended to call as an adverse witness, from testifying. After a hearing on the motion, the district court ruled that Mrs. Trammel could testify "to any act she observed during the marriage and to any communications 'made in the presence of a third person'; however, confidential communications between petitioner and his wife were held to be privileged and inadmissible." *Id.*

146. *Id.* at 43.

147. 583 F.2d 1166 (10th Cir. 1978), *aff'd*, 445 U.S. 40 (1980).

148. 445 U.S. 40, 53 (1980).

149. *Id.* at 50-53.

150. The Court stated that "[n]o longer is the female destined solely for the home and rearing of the family, and only the male for the marketplace and the world of ideas." *Id.* at 52 (quoting *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975)).

151. See text accompanying note 1 *supra*.

152. 445 U.S. 40, 52-53 (1980).

153. *Id.* at 51.

unwilling, however, to circumscribe spousal privilege to the same extent. Nevertheless, the *Trammel* Court decided that the time had come for the federal courts to follow the modern trend, by admitting the voluntary testimony of a witness-spouse when the information disclosed was not obtained in privileged marital communications.¹⁵⁴

The Supreme Court in *Trammel* did not discuss under what circumstances a court might be able to compel the testimony of a witness-spouse. Prior to *Trammel*, however, in *Lutwak v. United States*¹⁵⁵ and *Wyatt v. United States*,¹⁵⁶ the Court had placed two limitations on an accused's ability to prevent his spouse from testifying.

In *Lutwak*, three aliens had married United States citizens solely to obtain entry into the country under the War Brides Act.¹⁵⁷ None of the parties ever intended to live together as husband and wife, but rather, once their purpose was accomplished, they planned to terminate the marriages.¹⁵⁸ The wives testified at trial to their husbands' conspiracy to defraud the United States in violation of the immigration laws. The Supreme Court affirmed the admissibility of that testimony by stating that when a marriage is a sham, without marital harmony for the privilege to preserve, the accused should not be permitted to invoke its protection.¹⁵⁹

In *Wyatt v. United States*,¹⁶⁰ the defendant was charged with violating the Mann Act, by knowingly transporting a woman across state lines for the purposes of prostitution. After the offense, the accused married the victim who testified unwillingly at trial. The Supreme Court upheld the trial court's compelling of the witness' testimony, based on the belief that "a prostituted witness wife" was necessarily made subject to the will of her husband, as evidenced by his ability to have induced her into a life of prostitution.¹⁶¹ Consequently, it was reasoned that the victim's decision not to testify was probably based on her husband's influence over her.¹⁶² The Court did not go so far as to conclude that such testimony could be compelled in any trial for an offense by one spouse against the other. Rather, the *Wyatt* court limited its

154. The Court concluded that "vesting the privilege in the witness-spouse [would further] the important public interest in marital harmony without unduly burdening legitimate law enforcement needs." *Id.* at 53.

155. 344 U.S. 604 (1953).

156. 362 U.S. 525 (1960).

157. 344 U.S. 604, 606 (1953).

158. *Id.* at 606-09.

159. *Id.* at 615.

160. 362 U.S. 525 (1960).

161. *Id.* at 530.

162. *Id.* at 530-31.

decision, holding merely that testimony could be compelled from a spouse who, prior to the marriage, had been the victim of her husband's Mann Act violation.¹⁶³

It is unclear under what circumstances the United States Court of Appeals for the Fourth Circuit will permit the district courts to compel one spouse to testify against the other. When a husband and wife were incompetent to testify for or against each other, the federal courts recognized an exception for certain offenses committed by the accused against his spouse.¹⁶⁴ Other than the narrow *Wyatt* decision, however, there is no binding precedent dealing with this exception and little indication whether such spousal testimony, considered competent under the common law, will now be viewed as compellable.

Although the Supreme Court's proposed Federal Rules of Evidence were rejected by Congress, this does not negate the possibility that federal courts might view the proposed exceptions to the rule on the anti-marital facts privilege as persuasive authority in future cases.¹⁶⁵ Under that rule, the circumstances in which a defendant could not prevent his spouse from testifying against him were as follows:

- (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 . . . , with transporting a female in interstate commerce for immoral purposes . . . , or with violation of other similar statutes.¹⁶⁶

It should be noted, however, that the proposed rule vested the privilege in the accused-spouse.¹⁶⁷ Consequently, some of the aforementioned exceptions may not be as readily accepted as a basis for compelling the unwilling testimony of a witness-spouse.

Prior to *Trammel*, the Fourth Circuit discussed exceptions to the anti-marital facts privilege in *United States v. Shipp*.¹⁶⁸ In that case, a member of the armed services was charged with having sexual relations with his minor stepdaughter. Shipp's wife was never called upon to testify for either the Government or the defense. Nevertheless, the court noted that it was an open question

163. *Id.* at 531.

164. *Stein v. Bowman*, 38 U.S. (13 Pet.) 209, 221 (1839).

165. See 2 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* § 501[03], at 501-26 to -27 (1979).

166. 56 F.R.D. 183, 244-45 (1973).

167. See text accompanying notes 137-38 *supra*.

168. 409 F.2d 33 (4th Cir. 1969).

in federal courts as to whether, in such a case, a spouse would be a competent witness.¹⁶⁹ Broadly interpreting *Wyatt*, the court stated that in the federal judicial system, no privilege could be asserted by a defendant when the victim of the offense was his spouse.¹⁷⁰ It was also noted that many state courts have extended this exception to include an offense against the child of either spouse.¹⁷¹ Furthermore, the court mentioned that under the proposed Federal Rules of Evidence, the privilege could not be claimed in such cases.¹⁷² The Fourth Circuit was not called upon in *Shipp* to decide whether one spouse could be forced to testify against the other and did not do so, even in dicta. Absent conflicting future precedent, however, it would appear from the language employed by the *Shipp* court that the Fourth Circuit might compel such testimony in a case in which the spouse of the accused or the child of either is a victim of the crime charged.

B. *Privileged Communications*

Although courts within the Fourth Circuit have recognized that confidential marital communications are privileged,¹⁷³ apparently the court of appeals has not yet defined the scope of this privilege.¹⁷⁴ Therefore, analogous to the approach to the anti-marital facts privilege, one must turn to Supreme Court cases for guidance. In the late nineteenth century, the Supreme Court first voiced its acceptance of the privilege protecting confidential communications, on policy grounds.¹⁷⁵ It was not until the mid-twentieth century, however, that the Court defined its scope in *Wolfe v. United States*,¹⁷⁶ *Blau v. United States*,¹⁷⁷ and *Pereira v. United States*.¹⁷⁸

In *Wolfe*, the accused dictated an incriminating letter to be sent to his wife. His stenographer testified at trial from the notes she had taken prior to transcribing the dictation.¹⁷⁹ On certiorari

169. *Id.* at 35 n.3.

170. *Id.*

171. *Id.*

172. *Id.*; see text accompanying note 166 *supra*.

173. See, e.g., *Smith v. Baltimore & O.R.R.*, 473 F. Supp. 572, 585 (D. Md. 1979).

174. The Fourth Circuit in *United States v. Burton* has held, however, that privileged marital communications may be included in a presentence report. Relying on *Trammel*, the *Burton* court concluded that only the spouse's testimony in the courtroom is prohibited. 631 F.2d 280 (4th Cir. 1980).

175. In the Supreme Court case, *Hopkins v. Grimshaw*, 165 U.S. 342 (1897), it was decided that the widow of the decedent, whose trust property was the subject of the litigation, was incompetent to testify to a conversation with her husband that had occurred during their marriage. Even though the bar of incompetency had been removed in most cases, the Court concluded that the law was inapplicable to spouses "upon grounds of public policy." *Id.* at 349.

176. 291 U.S. 7 (1934).

177. 340 U.S. 332 (1951).

178. 347 U.S. 1 (1954).

179. See 64 F.2d 566, 566 (9th Cir.), *aff'd*, 291 U.S. 7 (1934).

to the Supreme Court, *Wolfe* asserted that his stenographer should have been excluded from testifying on the same grounds that an attorney's clerk or physician's nurse is precluded from testifying to otherwise privileged information.¹⁸⁰ This argument was rejected based on the Court's belief that, contrary to the physician-patient or attorney-client relationship, reason and convenience do not demand the extension of the privilege to third parties in order to protect confidential communications between husband and wife.¹⁸¹ The Court stated that

[c]ommunications between . . . spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged; but wherever a communication, because of its nature or the circumstances under which it was made, was obviously not intended to be confidential it is not a privileged communication. . . . And, when made in the presence of a third party, such communications are usually regarded as not privileged because not made in confidence.¹⁸²

The Court, however, refrained from commenting on whether, under similar facts to those in *Wolfe*, the wife's testimony would also have been permitted over her husband's objection.¹⁸³

The presumption that marital communications are privileged was reasserted in *Blau v. United States*.¹⁸⁴ In *Blau*, the petitioner, relying on his privilege not to relate confidential marital communications, refused to reveal the whereabouts of his wife, who was wanted as a witness in a grand jury investigation of Communist Party activities in Colorado.¹⁸⁵ Consequently, he was sentenced to imprisonment for contempt, and the United States Court of Appeals for the Tenth Circuit affirmed.¹⁸⁶ On certiorari to the Supreme Court, the Government argued that the privilege could not be claimed by the petitioner, because he had failed to establish that the information was privately conveyed.¹⁸⁷ This assertion, in the Court's opinion, ignored the rule previously asserted in *Wolfe* that marital communications are "presumptively confidential."¹⁸⁸ Moreover, observing that several witnesses who appeared were incarcerated for contempt, the Court commented that it was "highly probable" that any communication by Mrs. Blau revealing her location to her husband was intended to be confidential.¹⁸⁹

180. 291 U.S. 7, 15-16 (1934).

181. *Id.* at 16-17.

182. *Id.* at 14.

183. *Id.* at 17.

184. 340 U.S. 332 (1951).

185. *Id.* at 333.

186. 179 F.2d 559 (10th Cir. 1950), *aff'd*, 340 U.S. 332 (1951).

187. 340 U.S. 332, 333 (1951).

188. *Id.*

189. *Id.* at 334.

In *Pereira v. United States*,¹⁹⁰ the Supreme Court indicated that evidence might be introduced to rebut the presumption that a marital communication is privileged. None of the communications to which the wife of the accused testified in that case were deemed to be privileged because they either occurred prior to the marriage, were made in the presence of third parties, or related to acts rather than oral or written expressions.¹⁹¹

Although the above Supreme Court cases apparently convey a clear picture of the applicability and scope of privileged marital communications for the federal courts to follow, it should be noted that the most recent Supreme Court case on confidential communications, *Pereira*, was decided over twenty-five years ago. Moreover, the 1972 Supreme Court's proposed Federal Rules of Evidence recognized no such privilege.¹⁹² Consequently, it is unclear whether "reason and experience" might convince the Court to alter its application of the privilege in future cases. Nevertheless, the Supreme Court in *Trammel*¹⁹³ and district courts within the Fourth Circuit¹⁹⁴ have recognized, at least in dicta, the continued validity of the privilege protecting confidential marital communications.

V. CONCLUSION

One of the few rules of evidence espoused by laymen is that a wife may not testify against her husband. In recent years, one state legislature after another has limited the application of this rule. For a century, Maryland and the majority of federal courts differed in the limitations they imposed on spousal testimony. As a result of *Trammel*, however, these courts now concur that, on matters not solely disclosed in confidential communications, one spouse can normally neither be compelled nor foreclosed from testifying against the other. The only possible area of disagree-

190. 347 U.S. 1 (1954).

191. *Id.* at 6-7.

192. The advisory committee notes to the proposed rules rationalized the committee's rejection of this privilege by stating:

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. The other communication privileges, by way of contrast, have as one party a professional person who can be expected to inform the other of the existence of the privilege. Moreover, the relationships from which those privileges arise are essentially and almost exclusively verbal in nature, quite unlike marriage.

2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 505[3], at 505-13 (1979).

193. 445 U.S. 40, 51 (1980).

194. *E.g.*, *Smith v. Baltimore & O.R.R.*, 473 F.Supp. 572, 585 (D. Md. 1979).

ment between Maryland and the Fourth Circuit may arise on the issue of whether a spouse can be compelled to testify when he was the victim of the crime charged.

Changing views on marriage and the individual rights of marital partners have greatly altered the legal rights and obligations of family members in the past decade. The decreasing exclusion of spousal testimony is but one more step in a long overdue reexamination by courts and legislatures of their special treatment of family members, which affords judicial protection at the expense of valuable evidence.

Marleen Bleich Miller