A Right to Every Woman's Evidence

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A Right to Every Woman’s Evidence*

Richard O. Lempert†

I am indeed honored to be here with you today, honored to be joining you next year as Iowa’s first Mason Ladd Visiting Distinguished Professor of Law, and honored to be giving the first Mason Ladd Lecture. The honor lies not just in the recognition you accord me, but also in the linkage to the man in whose name this recognition is given.

When I accepted Dean Hines’ invitation to give this talk Dean Ladd was still alive, and I had hoped very much that on this visit I would meet him. Now I must know him only by reputation, a scholarly reputation that placed him among the giants in the field of evidence and a reputation as an educator which for many years made his name synonymous with this great law school. I shall not attempt to say more about Dean Ladd, for you know more about him than I could tell, but I shall turn instead to a topic in the field he loved best.

I would like to talk to you about the recent case of Trammel v. United States.¹ Trammel is a simple case. A man, Otis Trammel, his wife Elizabeth Ann, and several others were involved in a conspiracy to import heroin into the United States. Elizabeth, a courier for the group, was caught with four ounces of heroin during a routine customs search in Hawaii. Otis, we are told by the Tenth Circuit, was one of three men who “masterminded” the operation.²

They say “it takes a thief to catch a thief.” One might add, “it takes a conspirator to convict a conspirator.” Often the best—and sometimes the only—evidence that a person has been active in a conspiracy is testimony from the person he has conspired with. There are two problems with securing such testimony. The first is that each conspirator has a fifth amendment right not to give testimony that might tend to incrimi-

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† Professor of Law, University of Michigan Law School. A.B. 1964, Oberlin College; J.D. 1968, Ph.D. 1971, University of Michigan. I would like to thank Judy Cox and Victoria List who aided me in researching contemporary and historical aspects of the spousal immunity. I am grateful to the Cook Funds of the University of Michigan Law School which allowed me to employ two such capable assistants. I would also like to thank my colleagues Tom Green and John Reed for their helpful comments on a draft version of this manuscript and my secretary Dorothy Blair for her patience and skill in making numerous “final” changes.

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nate him—and almost anything that tends to incriminate a fellow conspirator will incriminate the speaker as well—and the second is that totally apart from the danger of self-incrimination there may be a degree of honor among thieves; a person may simply not want to testify against a partner in crime. Fortunately, the state can overcome each obstacle, the first by giving use immunity thereby negating the fifth amendment claim and the second by offering a reward—such as an agreement not to prosecute—sufficient to overcome any natural hesitancy to turn on one's fellows.

In Trammel, the prosecutor, whether from delicate feelings of chivalry, a sense of relative blameworthiness, or a good idea as to who would break first under pressure, chose not to indict the two women involved provided they would testify against the three men. So far, so good; justice is on its way to being done. However, there was one hitch. Elizabeth Ann Trammel was Otis Trammel's wife and under a rule of law which Wigmore called the privilege for anti-marital facts, but which I prefer to call the spousal immunity, Trammel had an apparent right to prevent his wife from testifying against him.

This rule, or privilege if you will, apparently arose in the late sixteenth century. Its existence is implied by a case in Chancery in 1579 and it is mentioned frequently enough in the early seventeenth century, that one may safely presume a somewhat earlier existence. The rule provides, with certain exceptions not applicable in Trammel, that one spouse may not testify against the other in a criminal case.

In the early common law it applied in civil as well as criminal cases. Indeed, it was applied in cases involving third parties in which testimony implicating one's spouse in a crime was barred although the implicated spouse could not be literally incriminated.

A closely related common-law rule prevented interested parties from testifying on their own behalf. This disqualification of parties on the grounds of interest was held to bar the favorable testimony of the parties' spouses as well. This disqualification and the spousal immunity are thought by some commentators to have been closely linked—both aspects of the idea that husband and wife are one. However, the distinct nature of the two rules is implicit in some of the earliest writings and is clearly stated in eighteenth century cases and treatises. Bent v. Allot, 21 Eng. Rep. 50 (Ch. 1579-1580), is a case in which a defendant examined his own wife as a witness. The court held that the examination would be suppressed if the plaintiff did not allow her to be cross-examined. Hudson, after citing the civil unity (husband and wife are one) argument, notes a case in which a wife
common-law rule meant, in effect, that one spouse could not testify against another over the other spouse's objection. It is this rule that has been transformed, in a way I shall soon describe, by the Supreme Court's opinion in *Trammel* and by the decisions of numerous state courts and legislatures before that. A related rule, which protects the confidentiality of private marital communications, has not been affected by these developments.

Reviewing the history of the spousal immunity, two features stand out. First, it has almost always been used to bar the testimony of wives against their husbands. Of the hundreds of cases I have seen, from the mid-seventeenth century on, only a handful involve men in a position to incriminate their wives. This distribution no doubt reflects the greater criminality of the male of our species. I don't know how the sexual distribution of barred witnesses will be affected by the increasing involvement of women in serious crime, but it is fair to say that until now the rule has operated primarily as a limit on the law's right to every woman's

was examined against her husband and it was held that if the husband cross-examined the wife her testimony would have been admitted since both sides "allowed her." M. HUDSON, A TREATISE OF THE COURT OF THE STAR CHAMBER 205 (c. 1631). These cases suggest that at the time the immunity was emerging the distinction between the immunity and disqualification for interest was recognized for both could be waived and different rules of waiver applied to each.

In *Rex v. Cliviger*, 100 Eng. Rep. 143 (K.B. 1788), Judge Gross wrote:

But in all the books which treat of evidence, there are certain technical rules laid down. . . . Some of these relate to husband and wife; and we find the general rule as to them to be founded, not on the ground of interest, but of policy; by which it is established that a wife shall not be called to give testimony in any degree to criminate her husband . . . . On the first trial the objection was considered by Gould, J. on the ground of interest, and considering it merely in that light, he might have done right in overruling it: but the true and best ground of objection is not that of interest, but is founded on the political inconvenience of causing dissensions in families between husband and wife; and so it is put by Lord Hale. In Hawkins's Pleas of the Crown the objection also is considered in the same view; and my Lord Hardwicke adopted it in the case before him.

*Id.* at 146 (emphasis original).

In BULLER'S NSI PRIUS 309 (1773) one reads: "That Husband and Wife cannot be admitted to Witness for each other, because their Interests are absolutely the same; nor against each other, because contrary to the legal Policy of Marriage."

The situation may have been temporarily confused toward the end of the century when Lord Kenyon in the case of *Davis v. Dinwoody*, 100 Eng. Rep. 1241 (K.B. 1792), interpreted an argument based on the separate rationales for the disqualification and the immunity to assert the rule that husbands and wives are not allowed to testify for or against each other because they were, in his words, "so nearly connected, they are supposed to have such a bias upon their minds that they are not to be permitted to give evidence either for or against each other." *Id.* But the arguments of counsel in this case indicate that the distinction between the disqualification and the immunity and the rationales for each were well recognized by this time, even if the particular court chose to ignore them in stating a broad rule.

9. More precisely, my research assistants Victoria List and Judy Cox have looked at these cases and reported on them to me.
evidence. In view of this, I shall abandon the sex neutral term "spouse" that I have thus far used and shall instead refer to testifying or witness spouses as "wives" and defendant spouses as "husbands."

Second, although the rule may have its origins in attitudes which we regard today as irrational, such as the notion that husband and wife are in some sense one or that for a woman to incriminate her husband is akin to petty treason, it is also the case that from the earliest times an important justification for the rule was what we would today call an argument from public policy, namely, that to allow one spouse to testify against another might cause "implacable discord and dissension" and so threaten a marriage.10

10. As far as I can tell this phrase first appears in 1628 in COKE, COMMENTARIES UPON LITTLETON (1628). Coke writes:

[A] wife cannot be produced either against or for her husband, qua sunt due animae in carne una [because they are two souls in one body]; and it might be a cause of implacable discord and disension between the husband and the wife... Id. § 6b. Note that Coke is talking about both the disqualification from interest which meant that one spouse could not testify for another if the other was barred by interest from testifying and the bar to adverse testimony. It is possible that the Latin phrase was meant to apply solely to the interest disqualification and the policy argument solely to the immunity. If so, Coke's statement occasioned confusion because some later courts confused the disqualification from interest with the immunity or attribute the immunity to both the mystical oneness of husband and wife and the implications that adverse testimony would have for the marriage. However, it appears that during the next two centuries the courts more often than not distinguish correctly between the disqualification and the immunity and justify the immunity by reference to the policy argument. Perhaps the argument from mystical oneness has received the prominence it has in the debate because it is such a convenient whipping boy for those opposed to the privilege. For example, Chief Justice Burger, in Trammel, suggests that the original reason for the privilege was a demeaning view of women inherent in the idea that husband and wife were one. 445 U.S. at 44, 52. The argument regarding marital harmony is considered the "modern justification." Id. at 44. Yet we see that both arguments can be traced to Coke and it may be that the civil unity argument was never taken as the primary justification for the immunity. Mary Grigg's Case (1672), reported in Sir Thomas Raymond, Reports of Divers Special Cases 1 (1743), the first reported case I could find citing Coke in support of excluding a spouse's testimony, refers only to Coke's policy rationale. Id. Many early cases give no justification for excluding a spouse's testimony but simply cite what was by then regarded as a settled rule. Those cases providing a rationale for the rule include: Barker v. Dixie, 95 Eng. Rep. 171, 171 (K.B. 1736) (marital harmony rationale); Bentley v. Cooke, 99 Eng. Rep. 729, 729-30 (K.B. 1784) (at least one justice, Buller, was apparently influenced by the domestic harmony argument); Rex v. Cliviger, 100 Eng. Rep. 143, 144 (K.B. 1788) (marital harmony rationale); Davis v. Dinwoodie, 100 Eng. Rep. 1241, 1241 (K.B. 1792) (bias); State v. Gardner, 1 Conn. (Root) 485, 485 (1793) (husband's interest because in testifying to wife's adultery he might be laying a foundation for divorce). It is noteworthy that of these cases, which with one exception are the only pre-1800 cases I could find that state a rationale for excluding a spouse's testimony, none cites the mystical unity of husband and wife that modern critics assume was the source of the rule. The exception is Windham v. Chetwynd, 1 Burrows 414 (K.B. 1757), in which Lord Mansfield wrote: "In matter of evidence, husband and wife are considered as one; and cannot be witnesses, the one for the other. The husband cannot be witness for his Wife, in a question touching her separate estate." Id. at 424 (emphasis original). Despite his bold state-
"Implacable discord and dissension": the phrase has a nice ring to it. Not only is it sonorous; it is also sensible. One can easily imagine marriages that would be destroyed if a wife, forced to testify against her husband, chose not to perjure herself, but instead played a crucial part in convincing the jury that her husband was guilty of a heinous crime. This is particularly so at the time this rationale arose, for in the seventeenth century all felonies were in principle punishable by death.11

Nevertheless, there are cases where one wonders how an honest court could cite this marital harmony rationale. For example, in one of the few cases where the rule sealed male lips, dangers of marital discord and dissension are the court's cited justification for refusing to receive a man's testimony that his wife had left him and bigamously married another.12 One can only admire a marriage that remained sufficiently harmonious despite the wife's desertion and remarriage that it was vulnerable to further discord should the first husband testify against the wife.

Or, conversely, one can only deplore a privilege which denies the law valuable information on the pretext of preserving marriages that have long since been destroyed by the behavior of the spouses. The privilege becomes even more deplorable if one believes that the policy justification is itself questionable. Jeremy Bentham, one of the earliest and most strident critics of the rule, wrote:

It disturbs domestic confidence. Whose? Those who abuse it to disturb the public security. A miscreant, then, who could be convicted of an atrocious crime by the testimony of a woman, has nothing to fear; if he has only time to go through the marriage ceremony! No asylum ought to be open for criminals; every sort of confidence among them must be destroyed, if possible, even in the interior of their own houses. If they can neither find mercenary protectors among the lawyers, nor con-

11. In fact the "benefit of clergy" was widely available at that time and where it was not pardons were often obtained.
12. Mary Grigg's Case, reported in Sir Thomas Raymond, Reports of Divers Special Cases 1 (1743). For cases in which a wife's testimony was not allowed as proof of her husband's alleged bigamy, see Broughton v. Harpur, 2 Raymond 752, 752 (K.B. 1701-1702), and Rex v. Cliviger, 100 Eng. Rep. 143, 147 (K.B. 1788) (Grose, J.). For a modern decision barring a wife from testifying after her husband had deserted her and remarried, see United States v. Walker, 176 F.2d 564 (2d Cir. 1949). Judge L. Hand who wrote the decision agreed that the marriage in question was wrecked and could not be saved, but he did not believe the rule should be changed to require courts to make judgments about the viability of particular marriages. Id. at 568.
cealment at their own firesides, what harm is done? Why, they are compelled to obey the laws, and live like honest people!\textsuperscript{13}

Wigmore found an answer to Bentham when he suggested that the real reason for the spousal immunity was that “there is a \textit{natural repugnance} in every fair-minded person to compelling a wife or husband to be the means of the other’s condemnation. . . .”\textsuperscript{14} However, Wigmore was not satisfied with his own answer:

This reason, if we reflect upon it, is at least founded on a fact, and it seems after all to constitute the real and sole strength of the opposition to abolishing the privilege. Let it be confessed, then, that this feeling exists, and that it is a natural one. But does it suffice as a reason for the rule? In the first place, it is not more than a sentiment. It does not posit any direct and practical consequence of evil. It is much the same reason that anyone might give for abolishing the office of spies in a war. In the next place, it exemplifies that general spirit of sportsmanship which, as elsewhere seen, so permeates the rules of procedure inherited from our Anglo-Norman ancestors. The process of litigation (many learned judges agree) is a noble kind of sport, and certain rules of fair play should never be overstepped. One of these is to give something of a start to the victim of the chase, to follow him by certain rules only and to respect his feelings so far as may be. This complicates the sport, and adds zest for the pursuers by increasing the skill and art required by them for success. The expedient of convicting a man out of the mouth of his wife is (let us say) poor sport, and we shall not stoop to it. Such is the theory and the sentiment of sportsmanship.\textsuperscript{15}

You can be sure that when a law professor attributes a rule to sport and sentiment his next step will be to urge its abolition for litigation is, quoting again from Wigmore, “not a game, and . . . the law can never afford to recognize it as such; . . . the law, moreover, does not proceed by sentiment, but aims at justice.”\textsuperscript{16} Yet is the wife’s stake in the matter only sentiment? Is there not injustice in forcing the wife—presumably an innocent party—to play the crucial role in the condemnation of her husband? If she balks at this and refuses to testify or lies from the stand is it just that we send her to prison for her contempt or her crime? Indeed, is our preference for justice ultimately anything more than a sentiment? When opposed by other sentiments, such as those we have toward family

\textsuperscript{15} J. BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 238 (M. Dumont ed., London, 1825).

\textsuperscript{16} \textit{Id.} (footnotes omitted).
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units, love, and the suffering of innocent people should justice always prevail?

Let us pause and take stock. We have a rule that has been with us for almost four centuries and subjected to scathing criticism for much of the last two. One of its rationales, the unity of husbands and wives, has been completely discredited and another, our repugnance at seeing wives testify against husbands, has been dismissed as mere sentiment, although we may want to dispute this dismissal. The third, the implications of forced testimony for marital peace, still stands. One may argue, as Wigmore does, that among the "multifold circumstances of life that contribute to cause marital dissension, the liability to give unfavorable testimony appears as only a casual and minor one,"¹⁷ but this misses the point. The concern is not with the ordinary marriage where the liability to give testimony remains inchoate but with the rare marriage where but for the privilege the testimony would be forced.¹⁸ In these cases the liability to give testimony might well be a cause of substantial dissension, and only in these cases can the abrogation of the immunity lead to more just results.

In cases where the privilege is invoked we are trading off the probable destruction of marriages and the probable anguish of innocent spouses against an increased likelihood that justice will be done. For the moment, we can consider the question of whether to allow this tradeoff as the basic policy choice. In balancing the competing interests we should realize that requiring the wife's testimony will not necessarily destroy the marriage. But, by the same token, abrogation of the immunity will not necessarily change an unjust result to a just one. If the wife refuses to testify nothing is gained at trial although we have whatever dubious satisfaction comes from seeing a contumacious witness punished. If the husband is guilty and the wife lies or if the husband is innocent but the wife testifies truthfully to incriminatory facts, it is the probability of injustice that has been enhanced by abrogating the rule. Even if the husband is guilty and the wife testifies truthfully justice is not necessarily furthered, for the wife's testimony may have been unnecessary to the conviction or her credibility might have been destroyed on cross-examination by the revelation of information that would only be known to an intimate.

Bentham's argument, picked up by Wigmore when he says it is a curious policy that allows a wrongdoer's interest (in his marriage) to be

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¹⁷. Id. at 216.
¹⁸. The immunity, unlike the privilege for confidential marital communications, has never been defended on the grounds that its existence enhances the stability of marriages generally. Thus, if Wigmore's point is that the existence of the immunity has virtually no impact on the general divorce rate, he is correct, but he is not responding to the marital harmony justification for the privilege. Instead, he is attacking a straw man that even he has not raised.
weighed in deciding whether he should be allowed to bar testimony against him,\textsuperscript{19} neglects the interests of innocent spouses as well as the interests which children and others have in keeping families together. We may have no sympathy for the wrongdoer and no respect for his interests, but we still might not want to force the innocent spouse to experience the anguish of testifying against her husband, nor, for the family's sake, do we want a marriage that might be intact upon acquittal, probation, or parole to be destroyed by the trial process.\textsuperscript{20}

But if Wigmore's arguments are wrong on these counts, he appears right on another. In applying the immunity the law never asks whether a particular marriage is indeed viable. Not only does the law not ask whether the marriage is worth preserving (a judgment we would probably not want courts to make); it also does not ask whether there is any marriage left to preserve. If there isn't, it makes no sense to deprive a court of evidence.

Surely once a marriage reaches the point where the wife is willing to testify against her husband there cannot be much of a marriage left to save. Furthermore, a wife willing to testify against her spouse is unlikely to suffer anguish at playing a role in his conviction. Thus, the strongest arguments for this marital privilege, the arguments from marital harmony and wifely anguish, have the same Achilles' Heel. At most they justify a privilege for the witness spouse. They do not justify allowing a defendant spouse to keep a witness spouse off the stand. Lawyers and law professors have been making these arguments for years. In \textit{Trammel} the

\textsuperscript{19} 8 J. Wigmore, Evidence § 2228, at 216 (McNaughton rev. 1961).

\textsuperscript{20} The Tenth Circuit's opinion in \textit{Trammel} is interesting because it employs a variant of Wigmore's argument to justify the district court's abrogation of the spousal immunity. You will recall that Trammel and his wife were coconspirators. The court of appeals used this circumstance to justify a denial of the privilege, treating a marriage of criminals as though it were a "criminal marriage" entitled to none of the law's tender mercies. Judge McKay, dissenting, properly pointed out that there was no evidence that the marriage was contracted to facilitate crime nor was there any reason to believe that the Trammels enjoyed criminal activity to the exclusion of those other shared intimacies that make marriage worthwhile and give the state an interest in preserving it. 583 F.2d at 1173 (10th Cir. 1978) (McKay, J., dissenting). The majority of the Tenth Circuit panel was also influenced by the fact that the wife had been granted immunity by the government, \textit{id.} at 1168, but this should have had no implications for the applicability of the privilege. Immunity protected the wife's fifth amendment interest; the issue in \textit{Trammel} was the husband's interest in not being incriminated by his wife's testimony. It is interesting to note that this case probably would not have reached the Supreme Court but for serious analytical mistakes by the trial judge and the majority upon first appeal. Portions of the trial transcript reproduced in the defendant's brief suggest that the trial judge could never be made to realize, despite the attempts of counsel, that the federal courts recognized a spousal immunity that was distinct from the privilege for confidential marital communications. The majority on the Tenth Circuit felt, with no justification in law or precedent, that the Government's ability to grant fifth amendment immunity to a witness in some way undercut another's right to claim a privilege with respect to that witness' testimony. \textit{Id.}
nation’s highest court finally listened. Chief Justice Burger, on behalf of the Court, wrote:

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.²¹

Here it appears we have a happy ending or at least a rational one, which is the same thing to most legal scholars. The rule is preserved, reaffirming our judgment about the special quality of marriages and our reluctance to force a woman to condemn someone she loves. But where the reason for the rule disappears, the rule does also, and courts are not deprived of valuable evidence.

I would stop here, except that I don’t believe what I have just said. I don’t believe Trammel is correctly decided, because I don’t believe it is wise to vest the right to claim the privilege solely in the witness spouse. Let me tell you why.

Years ago I happened to have a conversation about Earl Warren with a friend who was a clerk at the Supreme Court when the case of Hawkins v. United States²² was decided. In Hawkins as in Trammel the Court was invited to transfer the right to claim immunity from the defendant to the witness spouse, but in Hawkins the invitation was declined. My friend told me that when he was at the Court, Chief Justice Warren was in the habit of lunching on Saturdays with clerks from other chambers. One Saturday discussion turned to Hawkins. For the clerks the case was simple; the force of the rational argument that I have outlined for you could not be denied. The Chief Justice did not find the case so easy. Speaking as a former prosecutor, he described to the clerks various ways in which the state can secure apparently voluntary testimony from an unwilling witness. The clerks, impressed by Warren’s knowledge of the real world and the implicit lesson for those who master only logic, were even more impressed when it turned out that Hawkins provided an example of what the Chief Justice had described. The Court learned, sometime after this luncheon, that Hawkins’ wife had been imprisoned as a material witness and released only after giving a three thousand dollar bond conditioned upon her appearance in court as a witness for the United States.²³ As Justice Stewart noted in his concurring opinion, “These circumstances are hardly consistent with the theory that her

²¹ 445 U.S. at 52.
²³ Id. at 83 (Stewart, J., concurring). This information was revealed in a memorandum filed by the Government after the oral argument in the case. Id. at 82 (Stewart, J., concurring).
testimony was voluntary." Indeed, one is reminded of the English courts that warned of the danger of implacable discord and dissension should a person testify against a bigamous spouse. To call the wife's testimony in *Hawkins* voluntary, as the government tried to do, is just as disingenuous.  

As it turns out the testimony in *Trammel* is also not voluntary in any pure sense of the word. It is the product of a plea bargain. To obtain Ms. Trammel's testimony against her husband the government gave her immunity for her testimony and advised her that if she cooperated with the government she might be charged only with a misdemeanor and receive probation. Ms. Trammel may have testified willingly in a certain sense, for the facts give us every reason to believe that she preferred seeing her husband in prison to being there herself. But by this standard Hawkins' wife testified willingly, for she obviously found an agreement to testify against her husband more congenial than rotting in jail. In neither instance would I call the testimony voluntary.

It is also likely that by the time of Trammel's trial his marriage was destroyed. Chief Justice Burger certainly thought so, for as I've told you he wrote: "When one spouse is willing to testify against the other in a criminal proceeding—*whatever the motivation*—their relationship is almost certainly in disrepair." Yet what follows from this if the disrepair was caused, as we may assume for sake of argument, solely because of the Government's efforts. Surely a court that acknowledges the privilege's importance to marital harmony by continuing to vest it in the witness spouse should not tolerate a rule that gives the government strong incentives to break up those marriages it can.

24. Id. at 83 (Stewart, J., concurring).
25. It may be, however, that in *Hawkins* there was not much of a marriage to save whether or not the testimony was voluntary. Justice Stewart tells us that Hawkins and his wife were living apart under different names both at the time of the acts complained of and at the time of the trial. Id. at 82 n.4 (Stewart, J., concurring).
27. 445 U.S. at 52 (emphasis added).
28. It is not clear what kind of marriage the Trammels had at the time they were arrested or what the fact of arrest alone would have done to the marriage. I say we may assume the Government's effort to secure a plea bargain was solely responsible for the breakup because under the portion of Burger's opinion quoted in the text accompanying note 27 *supra*, it appears that the decision would have been the same had the wife's willingness to testify and the consequent destruction of the marriage been entirely because of the Government's offer to trade leniency for testimony.
29. Chief Justice Burger tries to deal with this issue in a footnote when he writes: It is argued that abolishing the privilege will permit the Government to come between husband and wife, pitting one against the other. That too, misses the mark. Neither *Hawkins*, nor any other privilege, prevents the Government from enlisting one spouse to give information concerning the other or to aid in the other's apprehension. It is only the spouse's testimony in the courtroom that is prohibited.
445 U.S. at 52 n.12. However, Burger's answer misses the mark. Because we cannot
The government is quite open about what’s going on. Indeed, one of the state’s primary arguments for vesting the immunity in the witness spouse is the “injustice to the witness-spouse of vesting in the defendant the power to destroy the witness-spouse’s ability to reach a favorable arrangement with prosecutors in his or her own case.” “[F]uture Elizabeth Trammels,” we are told, “would be prevented by their husbands’ power to invoke the marital privilege from protecting their interests in avoiding severe punishment.”

In other words it is unfair if the fact that a couple are married means that the government cannot destroy their relationship, the way it would the relationship of ordinary coconspirators, by emphasizing conflicting interests and allowing one guilty party to promote her well-being by turning in the other. Put another way, it is unfair to the wife if the state cannot threaten her with severe penalties if she does not condemn her husband and reward her with no penalty when she sells him out.

The Supreme Court in Trammel accepted this argument. I do not. First of all, I don’t think the state has any business turning one spouse against the other, even if it might advantage the spouse who has turned. Second, consider the quality of the unfairness that presumably results. A woman, unable to strike a bargain because she cannot testify against her husband, is convicted of a crime she has committed. What’s wrong with that? Are we to pity all criminals foolish enough to commit their crimes without accomplices because there is no one they can betray in exchange for a lighter sentence? Do criminals with accomplices have, at least if they are the less culpable, an equal protection claim to an attractive plea bargain contingent upon their turning state’s evidence?

To state these questions is, I think, to answer them. If there is necessarily prevent government action we deplore does not mean we should give the government an added incentive to engage in it. In Trammel, for example, the Government’s argument presented at text accompanying note 30 infra suggests that in many cases, including Trammel, the government would have no incentive to put pressure on a spouse if her testimony were not admissible. Furthermore, if the Court were worried about the government coercing wives into helping establish criminal cases against their husbands it might extend the policy of the immunity to bar the fruits of coerced spousal cooperation from the trial.


31. Chief Justice Burger wrote in Trammel:

[I]n 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. If the Government is dissuaded from making such an offer, the privilege can have the untoward effect of permitting one spouse to escape justice at the expense of the other.

445 U.S. at 52-53. These comments were made in the course of arguing that marriages would be just as jeopardized if the accused could bar his spouse from testifying, thus preventing her from receiving lenient treatment. However, if the government would not make the offer if the husband held the privilege, the wife would never know that her marriage had disadvantaged her.
anything wrong with not allowing a wife to waive the immunity, it is that a guilty husband will go free because a sufficient case cannot be made against him. But this is the cost of the privilege whether or not the wife was herself involved in the crime and thus vulnerable to the pressures of "Let's Make A Deal." We are back to basic value judgments involving the sanctity of marriages, whatever interest we have in their preservation, and the anguish of the spouse who testifies.

The fact that a woman is coerced into agreeing to testify does not mean that the decision to appear "willingly" did not cause her considerable grief. Indeed, it may lead to grief and guilt which will linger long after a prison sentence would have been served. It is true that the guilty wife's anguish may be assuaged by the thought that she will be spared the trauma that goes with criminal punishment, but, by the same token, an innocent wife's anguish might be assuaged by the material joys she might purchase if the state paid her a million dollars for her testimony. I believe we would not allow the state to buy, with a sum of money, the testimony of a wife who was not involved in her husband's crime. If not, I don't see a principled basis for letting the state buy that testimony with a promise of leniency when the wife is vulnerable to criminal prosecution.

I recognize the spousal immunity has serious costs, but abrogating the privilege is costly also. I support the privilege because I believe it is an important symbolic statement of our attitude toward marriage, because I believe it may play a role in keeping some marriages together at an extremely stressful moment, and because I believe it spares spouses, who may be innocent of wrongdoing, the anguish of being forced to testify against their loved ones. The Court's decision in Trammel is completely consistent with these values. I believe that decision is wrong because it mistakenly assumes that testimony is voluntary whenever a wife agrees to take the stand.

32. The quotation from the Court's opinion in Trammel reproduced in the text accompanying note 27 supra suggests the Court would allow the state to purchase a waiver from the wife. However, that hypothetical situation is so different from the situation in Trammel that I do not believe the Court would feel bound by this language should such a situation arise.

33. One might argue that conspirators should always feel the risk of betrayal by their fellow conspirators or that evidence of fellow conspirators is so necessary to convict that we should treat conspirators differently from innocent witnesses. If one accepted these arguments, which I do not, it argues for the complete abrogation of the marital privilege among conspirators. Note the arguments in the Tenth Circuit's opinion in Trammel and the effective answers of Judge McKay in dissent from that opinion. 585 F.2d at 1168, 1171-72 (McKay, J., dissenting). The Supreme Court's decision to vest the privilege in the witness spouse makes sense only if we accept the basic value judgments about the special need for the testimony of coconspirators but still want to give an out to the woman who despite great pressure or temptation wants to stand by her man.

34. We have been talking at length about the situation where the wife is a coconspirator and vulnerable to governmental pressure on that account; but we should not forget the lesson of Hawkins: the government has ways to put pressure on women who are
I fear that *Trammel* will do more than provide occasions on which the emptiness of moribund marriages will be confirmed. Instead, it will give the government an incentive to turn spouses against each other—to break up marriages in the cause of justice. For me this is too high a price to pay. If justice, in the marginal sense of convicting a few more guilty men, means we must allow the state to coerce the testimony of spouses, I am willing to trade a bit of justice for a bit of humanity. Wigmore would, no doubt, call these sentiments. I suppose they are. But I hope you share them, and I believe they should continue to inform the law.

Again I should stop, but candor compels me to admit that my analysis may be as mistaken as that of scholars who treat apparently willing testimony as necessarily voluntary and thus as an indication of a prior marital breakdown. As I've pointed out, the relationship between a wife's willingness to testify and the prior state of her marriage raises empirical questions which logic cannot answer. However, my analysis also turns in large measure on an empirical judgment: namely that by vesting the privilege in the witness rather than the defendant spouse we will be encouraging governmental coercion of at least initially unwilling women.

In fact, a majority of the states have either abolished the spousal immunity entirely or have vested the privilege in the witness spouse. I cannot say that wives in these states are often coerced into testifying against their husbands. Certainly the reported appellate cases provide scant evidence of coercion. However, we should not read too much into this. Where the privilege is abrogated or clearly vested in the witness spouse one would not expect issues involving spousal testimony to be raised on appeal.

Perhaps where the privilege is not available to the defendant, prosecutors for reasons of tactics or morality, do not attempt to pit spouse against spouse unless a marriage is obviously dead. If so, we may have the happy compromise of a rule broad enough to admit important evidence and prosecutors wise enough not to use it when other values are threatened.

I fear, however, that this view is too optimistic. Enough prosecutors are warriors against crime—or at least against criminals—that they are unlikely to sacrifice the chance of a conviction to values like those I have described. Indeed, tendencies to weigh such values heavily may be undercut by *Trammel*. Supreme Court decisions that decide only that a questionable activity is not prohibited often have the perverse result of not involved in the charged crime. For a description of how vulnerable material witnesses may be, see Carlson & Voelpel, *Material Witnesses and Material Injustice*, 58 WASH. U.L.Q. 1, 5 (1980).

35. Researching the case law I (which is to say my research assistant Judy Cox) was able to find only a handful of cases that suggested the wife's testimony may have been coerced, and all but one of these involved plea bargaining. *See*, e.g., Smitherman v. State, 264 Ala. 120, 122, 85 So. 2d 427, 429 (1956) (wife held in jail as a material witness for three and one-half months); Sheffield v. State, 241 Ga. 245, 245-46, 244 S.E.2d 869, 870 (1978) (wife granted immunity in exchange for her testimony).
publicizing questionable tactics and suggesting to many that what was once troubling is now appropriate. Prosecutors may interpret *Trammel* as an indication from the highest Court that it is good practice to induce wives to testify against their husbands and they certainly will interpret the case as an indication this is not wrong in any moral sense. Thus, as a result of *Trammel* we may see a marked increase in the rate at which wives are pressured to testify against their husbands even in states where such testimony has long been permitted.

It is, of course, too early to provide you with evidence of this, but there is one analogy that may be apt. For most of our constitutional history, news reporters asserted no special privilege to protect either information given them in confidence or the identity of their sources, yet for most of our history reporters were effectively free from subpoena. While this pattern may have existed in part because reporters were willing to share the information they possessed or because they seldom appeared to have valuable information, it is also likely that it reflected an attitude toward the press and the press’ role in our lives. About 1968 things changed as a flurry of subpoenas, usually directed at those who covered the more “radical” beats, were issued at the instance of prosecutors. It is possible if not likely that attempts to subpoena reporters would have evaporated with the radical protests of the late 1960s, but news reporters chose to assert a first amendment based privilege. In *Branzburg v. Hayes*, the Supreme Court, by a five-four vote, denied the reporters’ claim. Since that time subpoenaing reporters has become a standard information gathering tool of both prosecutors and defense counsel. Would this pattern have developed had *Branzburg* never been brought? I don’t know, but I think not. *Branzburg* may have both publicized a source of evidence and legitimized using it. I fear that *Trammel* will similarly affect prosecutors’ judgments about the appropriateness of inducing wives to testify against their husbands and that as a consequence important values will suffer.

In conclusion I would like to tell you what this talk is about, or at least what I have been about. My talk is of course about the spousal immunity and the *Trammel* case, but although I feel strongly about these matters (perhaps more strongly than the issues warrant), I have not chosen this topic because I think it important to persuade you of my position. I entertain no illusions on the issue that matters. No court, having abrogated a privilege, has, to my knowledge, subsequently reinstated it.

Instead of considering what I have said, consider what I have been required to draw on: English legal history of the seventeenth and eight-

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38. For cases see various issues of *News Media and The Law*, a publication of the Reporters Committee for Freedom of the Press.
eenth centuries; Bentham and Wigmore, each a leading scholar of his generation; logical analysis as we are taught it in law schools; attorneys' briefs and Supreme Court opinions; the sociology of prosecutorial behavior (fraught, to be sure, with empirical inadequacy); and your responses and mine to questions we cannot escape when values clash. These are but some of the paths down which the study of evidence takes you. You know far better than I the joys which Dean Ladd found at this law school and in this town. I hope that I have given you some sense of what makes evidence a fascinating field of scholarship (dare I say "the joys of evidence") and some understanding of why one of the great figures in the history of this law school chose to devote his scholarly life to it.