

Honey the Judge Says We're History: Abrogating the Marital Privileges via Modern Doctrines of Marital Worthiness

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NOTES

“HONEY, THE JUDGE SAYS WE’RE HISTORY”: ABROGATING THE MARITAL PRIVILEGES VIA MODERN DOCTRINES OF MARITAL WORTHINESS

INTRODUCTION

Although criticized and attacked for centuries,¹ the marital privileges continue to give married persons a powerful tool to suppress evidence at trial. In federal court and in most state courts, a married person’s testimony may be foreclosed at the trial of that person’s spouse through invocation of the marital privileges.² Take the hypothetical case of Jim and Susan: Jim, married to Susan, robs a bank at gunpoint. He then comes home and leaves the gun, which Susan sees, on his dresser. He also tells her about the robbery. Jim is later charged with the crime. At Jim’s trial, Susan may invoke the adverse testimonial privilege³ to prevent the prosecution from questioning her about the gun, Jim’s statements, or anything else related to the crime. In the alternative, Susan or Jim may invoke the confidential communications privilege⁴ to prevent the prosecution from questioning Susan about Jim’s statements to her.

The marital privileges evolved because courts and legislatures, by implication, determined that protecting the harmony of legal marital unions was more important than truth-seeking at trial.⁵ Courts assert that the marital privileges are “necessary to foster family peace, not only for the benefit of husband, wife, and children, but for the benefit of the public as well.”⁶

¹ See *infra* note 32.

² See *infra* Part I.

³ See *infra* part I.A.1.

⁴ See *infra* part I.A.2.

⁵ When a court upholds a marital privilege, the implication is that the court values marital harmony higher than truth-seeking. The Supreme Court made this point explicit in *Trammel v. United States*, 445 U.S. 40, 50 (1980). See also MURL A. LARKIN, FEDERAL TESTIMONIAL PRIVILEGES § 4.02[1] (1991).

⁶ *Hawkins v. United States*, 358 U.S. 74, 77 (1958); see also *Trammel*, 445 U.S. at 48 (“[T]he long history of the privilege suggests that it ought not to be casually cast aside. That the privilege is one affecting marriage, home, and family relationships—already subject to much erosion in our day—also counsels caution.”). For a discussion of proposals for a broader relational privilege extending to nonlegal marriages, see *infra* notes 40-43 and accompanying text. This Note, however, is limited to an analysis of the marital privileges as they currently are defined.

As the Supreme Court established in *Pennoyer v. Neff*,⁷ the states have exclusive jurisdiction over the prerequisites to a legal marriage.⁸ Thus, courts and legislatures applying the marital privileges must look to state law for a definition of legal marriage.⁹ However, modern marital privilege jurisprudence, by ignoring state law definitions of marriage, has narrowed the marital privileges improperly via doctrines of marital worthiness. These doctrines—the *Trammel* rule, the viability doctrine, and the premarriage acts exception¹⁰—pass judgment on the strength of the marital relationship even when state domestic relations law makes no such decision. Under these doctrines, courts and legislatures make assumptions about the strength of certain marital unions, based either on presumptions or on ad hoc fact inquiries. These assumptions and inquiries, however, are not made within the structures of state domestic relations law.

Although no principle of law inherently prevents a state legislature from employing two definitions of marriage—one for domestic relations purposes and one for the marital privileges—such a course of action is undesirable. Decisions regarding marital status are best left to those with the expertise and experience necessary to make informed and carefully considered decisions regarding marriage—legislative committees charged with drafting domestic relations law or state family courts.

⁷ 95 U.S. 714 (1878).

⁸ “The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created. . . .” *Id.* at 734-35; *accord* *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

⁹ The privileges in state court are determined by either judicial or legislative decision. *See infra* note 14. In federal court, the Federal Rules of Evidence govern the court’s application of the privileges. In most situations, federal courts look to the body of federal common law to determine privileges, *see* FED. R. EVID. 501, but in civil actions and proceedings in “which state law supplies the rule of decision” (generally diversity actions), privilege is determined according to state law. *Id.*

The Federal Rules of Evidence, as originally proposed to Congress by the Supreme Court, contained nine separate privileges, including the husband-wife privilege (PROPOSED FED. R. EVID. 505). The proposals drew fierce opposition from those who saw the proposed privileges as a usurpation of the states’ rights to determine privilege law in diversity actions and feared a resulting lack of uniformity of decision between federal and state courts hearing similar actions in the same state. Congress opted not to adopt any of the proposed privilege rules and instead enacted Federal Rule of Evidence 501, which was lifted verbatim from the prior Federal Rule of Criminal Procedure 26.

The never-enacted Proposed Rule 505, addressing the husband-wife privilege, was also criticized by commentators because it included only an adverse testimonial privilege, and not a confidential communications privilege. *See* Mark Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CAL. L. REV. 1353 (1973). Most criticism of the marital privileges has been directed at the ATP, *see infra* note 32, which makes it easy to see why a rule maintaining that privilege, but denying the more widely accepted CCP, would fall under attack.

¹⁰ For a discussion of the three doctrines, *see infra* part III.

The privileges were created to protect legal marriages because of the belief that such marriages possess unique qualities beneficial to society.¹¹ When a court or legislature denies the privileges to a legal marriage, that denial in effect says that a legal marriage lacks unique qualities and does not deserve protection in all cases. This contradicts the marital privileges' purpose.

Decisions by federal courts regarding a marriage's worthiness or status are especially undesirable. Under *Pennoyer*, federal courts must follow state domestic relations law. Yet in marital privilege jurisprudence, federal courts regularly ignore *Pennoyer's* admonition that the federal courts have no jurisdiction over the definition of marriage.¹² Further, federal courts lack expertise in domestic relations law, making their decisions uninformed and problematic.

This Note assumes the existence of the privileges as currently mandated by the Supreme Court¹³ and most state legislatures.¹⁴ It is beyond the scope of this Note to argue for or against the existence of the marital privileges in light of the numerous philosophical, social, and cultural concerns at stake. Instead, this Note examines the privileges within this construct and argues that courts and legislatures should cease making determinations of marital worthiness without regard for domestic relations law or for the purpose of the privileges.

This Note first provides background on the marital privileges and how courts and legislatures properly limit the privileges to those legally married under state domestic relations law. The Note then examines, in depth, how courts and legislatures have eroded the marital privileges through the three doctrines of marital worthiness: the *Trammel* rule, the marital viability doctrine, and the premarriage acts exception.

¹¹ See *supra* note 6.

¹² See *supra* note 8.

¹³ *Trammel*, 445 U.S. 40, 53 (1980) (upholding marital privilege as furthering the important public interest in marital harmony).

¹⁴ For a list of marital privilege statutes in the states, see *Trammel*, 445 U.S. at 48 n.9 (1980). For full texts of some of those statutes, see 3 GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, *EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES* (1987 State Rules App. & Supp. 1990).

I BACKGROUND

A. Modern Marital Evidentiary Privileges: Scope and Application

Two separate marital privileges currently exist: the adverse testimonial privilege and the confidential communications privilege.¹⁵ Both privileges seek to protect some aspect of the marital relationship at the expense of truth-seeking at trial.

1. *Adverse Testimonial Privilege*

The adverse testimonial privilege (ATP) generally applies only in criminal actions.¹⁶ In its simplest form, the ATP bars testimony by a witness against the defendant when the witness and the defendant are married at the time of trial;¹⁷ however, prior to a grant of privilege by a court, the person asserting the ATP¹⁸ must prove the

¹⁵ The adverse testimonial privilege is also known as the antimarital facts privilege. For a discussion of the distinctions between the two privileges, see JACK B. WEINSTEIN & MARGARET A. BERGER, 2 WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR UNITED STATES COURTS AND FOR STATE COURTS 505-6 (1991).

¹⁶ See WEINSTEIN & BERGER, *supra* note 15, at 505-13.

¹⁷ Originally, under the ATP, in federal court a spouse could not give testimony for or against the other spouse. This rule was an outgrowth of the common-law rules of coverture, under which parties to lawsuits were incompetent to testify due to their interest in the proceedings. Thus, a party's spouse, who was legally the same entity and the actual party were disqualified. Eventually the rules of coverture changed and spouses became separate legal entities, but witness-spouses were still deemed incompetent to testify because of their interest as spouses. Hence, disqualification of spousal testimony was not spoken of as a privilege, but as a corollary to the disqualification of a party-interest's testimony. Thus, a spouse could not testify for or against the other spouse. In short, the early rules of incompetence were based on "a general unwillingness to use testimony of witnesses tempted by strong self-interest to testify falsely." *Hawkins v. United States*, 358 U.S. 74, 75 (1958).

Spousal incompetency survived until fairly recently. See *Funk v. United States*, 290 U.S. at 371 (1933) (removing the bar of incompetence from spousal testimony in federal court). But incompetency has been replaced with a new rule and rationale. Today, under federal common law and under most state law, spouses of parties to lawsuits, like the parties themselves, are competent to testify, but an assertion of the ATP may prevent a witness-spouse from testifying. While the ATP suppresses testimony at trial, the parties are competent to testify and may waive the privilege. See generally Barbara G. Glenn, Note, *The Deconstruction of the Marital Privilege*, 12 PEPP. L. REV. 723 (1985) (arguing that the privileges now rest on protection of the marriage instead of divergent notions such as competence and voluntariness of testimony). Additionally, today the privilege, unlike the former rule of incompetence, is only used to prevent adverse testimony. See *Funk*, 290 U.S. at 371 (ending the rule of spousal incompetence by allowing witnesses to testify favorably for their spouses). However, some states still grant the privilege to favorable as well as adverse testimony. See, e.g., WASH. REV. CODE § 5.60.060 (Supp. 1991) ("A husband shall not be examined for or against his wife . . . nor a wife for or against her husband . . .").

¹⁸ In some state courts, the defendant-spouse, the witness-spouse, or both may assert the ATP. In federal court, only the witness-spouse may assert the ATP. See *Trammel*, 445 U.S. 40

existence of a legal marriage.¹⁹ Until the advent of the premarriage acts exception,²⁰ the ATP covered testimony relating to events before or after the marriage.

The most commonly offered rationale for the ATP is preservation of marital harmony by suppressing testimony that would disrupt marital peace.²¹ A trial involving even one spouse is deemed to place extreme strains on the marriage. Thus, permitting one spouse to testify against the other is disfavored because this may damage the relationship. Another rationale for the ATP asserts that courts should not provide forums for the display of one spouse testifying against the other, a display which has been labelled a sight of "natural repugnance."²²

In 1980, *Trammel v. United States*²³ drastically altered the ATP in federal criminal proceedings. After *Trammel*, only witness-spouses may raise the privilege to prevent their examination on the witness stand. Thus, when the witness-spouse is willing to testify voluntarily,²⁴ the defendant-spouse cannot foreclose adverse testimony.

¹⁹ See *In re Grand Jury Proceedings*, 640 F.Supp. 988, 989 (E.D. Mich. 1986). In some courts, the witness-spouse may be called to the stand but then excused upon assertion of the privilege. Other courts, however, hold it error even to put the witness-spouse on the stand, because such action brings the privilege to the fact-finder's attention and raises an inference that the party-spouse has something damaging to hide. See *San Fratello v. United States*, 340 F.2d 560, 566 (5th Cir.) (reversing the verdict against defendant because the government had called defendant's wife to the stand knowing that she would raise the marital privilege), *reh'g denied*, 343 F.2d 711 (1965); accord *State v. McGinty*, 126 P.2d 1086 (Wash. 1942).

²⁰ See *infra* part III.C.

²¹ Justice Black explained the justifications for the ATP in *Hawkins*, 358 U.S. at 74. Justice Black believed that the privilege fosters family peace by preventing testimony that could promote marital dissension. He asserted that the privilege also serves the public, because the public has an interest in promoting stable domestic relations:

The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now.

Id. at 77. Although *Trammel* overruled *Hawkins*' basic holding that either the witness- or party-spouse can raise the ATP, *Trammel* left untouched *Hawkins*' affirmation of the validity of marital privilege. See *infra* part III.A.

²² See 8 WIGMORE ON EVIDENCE § 2228, at 217 (John T. McNaughton rev. 1961). "[A] natural and strong repugnance was felt . . . to condemning a man by admitting to the witness stand against him those who lived under his roof, shared the secrets of his domestic life, depended on him for sustenance and were almost numbered among his chattels." *Id.* § 2227, at 212.

Professor Wigmore, though calling this rationale "plausible" and "at least founded on a fact," believed that it, like the marital harmony rationale, cannot withstand criticism. *Id.* at 217.

²³ 445 U.S. 40 (1980). For a discussion of *Trammel*, see *infra* notes 64-81 and accompanying text.

²⁴ See *Trammel*, 445 U.S. at 53.

2. Confidential Communications Privilege

The confidential communications privilege (CCP) in its simplest form prevents a spouse from testifying as to any information (adverse or favorable) communicated confidentially (verbally or otherwise)²⁵ to the other spouse.²⁶ The CCP protects the marital relationship by assuring married persons full confidentiality for communications with their spouses.²⁷ The privilege protects confidential communications because of their nexus with the marital relationship, which the CCP, like the ATP, values at a higher level than truth-seeking in court.²⁸ However, unlike the ATP, the witness-spouse and the party-spouse do not have to be married at the time of trial to raise the CCP; they simply must have been married at the time of the communication. Thus, the CCP applies at trial even if the witness-spouse and party-spouse are no longer married.²⁹ The CCP is usually available in both criminal and civil proceedings.³⁰

²⁵ Courts do not completely agree on the definition of "confidentially." Generally, the communication must occur within the marital relationship (not in a business context) and cannot be revealed to third parties. See *United States v. Marashi*, 913 F.2d 724 (9th Cir. 1990). Some state marital privilege statutes extend the communications privilege beyond verbal communications to acts that are not necessarily communicative but which are performed in private and only witnessed by the other spouse. See, e.g., OHIO REV. CODE ANN. § 2945.42 (Anderson 1981) ("Husband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture . . ."); TENN. CODE ANN. § 24-1-201 (1980) ("[N]either husband nor wife shall testify as to any matter that occurred between them by virtue of or in consequence of the marital relationship . . .").

²⁶ Perhaps because a communications privilege is often unnecessary when a rule of competence or the ATP will deny the testimony anyway, the CCP took longer to come into its own, separate legal existence. See *Shenton v. Tyler*, 1 Ch. 620 (Ch. 1939) (declaring that no such privilege as the CCP existed at common law); *Stapleton v. Crofts*, 118 Eng. Rep. 137, 140 (1852) (calling protection of conjugal confidences "not yet established" as a rule). In England, the Evidence Amendment Act § 3 (1853) finally recognized the CCP as a legal concept. One English court has declared the communications privilege in that country to be purely statutory. See *Shenton*, 1 Ch. 620.

²⁷ "There is no place like a bed for confidential disclosures between friends. Man and wife, they say, there open the very bottom of their souls to each other; and some old couples often lie and chat over old times till nearly morning." *United States v. Byrd*, 750 F.2d 585, 593 n.5 (7th Cir. 1984) (quoting conversation between Ishmael and Queequeg, in HERMAN MELVILLE, *MOBY DICK* 54 (Norton critical ed. 1967)).

²⁸ The CCP's rationale rests on three precepts: (1) confidential communications are essential to the marital relationship; (2) the marital relationship is a proper area for the law to protect; and (3) the injury to the relationship following disclosure of a confidential communication outweighs the benefit to the judicial system in terms of truth-seeking that would follow disclosure. See WIGMORE, *supra* note 22, § 2332, at 642.

²⁹ See SCOTT N. STONE & RONALD S. LIEBMAN, *TESTIMONIAL PRIVILEGES*, § 5.09 (1983).

³⁰ See LARKIN, *supra* note 5, § 4.03[3]. In most states, however, the CCP does not apply to civil actions by one spouse against the other or to divorce actions. See STONE & LIEBMAN, *supra* note 29, § 5.15, at 357.

3. *Interconnection of the Two Privileges*

Although the two privileges differ in application, both promote some aspect of the marital relationship. The CCP promotes the marital relationship at the time of communication and the ATP protects the marital relation at the time of trial.³¹ Both require a determination of the marital status of the party and witness.³²

³¹ The [ATP] looks forward with reference to the particular marriage at hand: the privilege is meant to protect against the impact of the testimony on the marriage. The [CCP] in a sense, is broader and more abstract: it exists to insure that spouses generally, prior to any involvement in criminal activity or a trial, feel free to communicate their deepest feelings to each other without fear of eventual exposure in a court of law.

Byrd, 750 F.2d at 590.

³² Between the two marital privileges, the ATP has received the majority of commentators' and courts' criticisms, although the CCP is not without its detractors. Jeremy Bentham, writing in 1827, argued that the ATP unduly burdens the pursuit of truth and grants license to the evil-doer to recruit his spouse into the web of crime: "[The marital privilege] secures, to every man, one safe and unquestionable and ever ready accomplice for every imaginable crime." 5 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 338 (1827).

Professor Wigmore, quoting Bentham and others, also voiced strong opposition to the ATP. In his view, because the rule has existed so long, reasons for it have simply been invented *ex post facto*. WIGMORE, *supra* note 22, § 2228, at 213. Wigmore summarized his view on the ATP by stating, "This privilege has no longer adequate reason for retention. . . . [It] is the merest anachronism in legal theory and an indefensible obstruction to truth in practice." *Id.* at 221.

Critics of the ATP have also opposed its fundamental tenet that marital harmony is more important than truth-seeking. For example, Wigmore asked why, when Doe's wife witnesses Doe commit a wrong against Roe, the judicial system favors Doe's own marital interests over Roe's interests in determining whether "justice shall have its course against him." *Id.* at 217.

In addition, critics have questioned whether the privilege actually promotes marital harmony, because the accuracy of this assumption has never been explained logically or empirically. *See id.* at 216. Furthermore, critics mock the "natural repugnance" rationale (the spectacle of spouses testifying against one another in court) as a sentiment that has no place in a court of law. *See id.* at 217; *see also* UNIF. R. EVID. § 23(2) cmt. (1953) (calling the ATP a "sentimental relic").

One critic has even gone so far as to call for the end of the ATP because the numerous exceptions to the rule, formed out of a judicial contempt for it, are inconsistent and thus undermine its rationale. *See* David Medine, *The Adverse Testimonial Privilege: Time to Dispose of a "Sentimental Relic,"* 67 OR. L. REV. 519 (1988).

The CCP has fared better in the eyes of courts and commentators, perhaps because it resembles similar communications privileges such as the physician-patient privilege and the attorney-client privilege. Professor Wigmore, while vehemently denouncing the ATP, supported the CCP. Wigmore's only concern with the CCP was that the truth of its last tenet, *see supra* note 28 (discussing the three tenets of the CCP), cannot be known. Wigmore fully accepted the other tenets. *See* WIGMORE, *supra* note 22, § 2332, at 642.

II

TRADITIONAL LIMITATIONS ON THE MARITAL PRIVILEGES
THROUGH DEFINITIONS OF LEGAL MARRIAGE

Because both marital privileges are contrary to truth-seeking, all jurisdictions have held that courts must construe them narrowly.³³ Because the privileges by definition protect marital relationships, courts and legislatures restrict the privileges to those who are legally married, either at the time of trial (ATP) or at the time of communication (CCP). Thus, when determining whether a valid marriage exists at the operative moment, courts uniformly deny the marital privileges to spouses who previously divorced or whose marriage was annulled under appropriate state domestic relations law.³⁴ However, the CCP continues after divorce, providing the communication was made during marriage.³⁵ Similarly, death of one of the spouses can terminate the ATP but not the CCP. If one of the spouses has died, then by definition no marriage exists upon which to raise the ATP.³⁶ The CCP, however, protects communications made by a spouse who dies after the communication is made.³⁷ In addition to death and divorce, courts also accept other limits on the marital privileges. These limits relate to unmarried couples, common-law marriages, and sham marriages.

A. Engagement, Putative Spouses, and Unmarried Cohabitants

Couples not complying with the formal requirements of state marital procedures who have tried to assert the marital privileges have generally failed. Courts will not grant the marital privileges to

³³ One state court has held that limitations on the privilege need only be justified by a rational relationship to a legitimate state goal, since the privileges exist by virtue of legislative fiat, not constitutional right. *State v. Watkins*, 614 P.2d 835, 840 (Ariz. 1980).

³⁴ See *United States v. Termini*, 267 F.2d 18 (2d Cir.), *cert. denied*, 361 U.S. 822 (1959); *Damrell v. State*, 352 N.E.2d 855 (Ind. Ct. App. 1976).

A pending appeal from a divorce decree has no effect on the denial of the privilege. See *United States v. Fisher*, 518 F.2d 836 (2d Cir.) (holding that a decree of divorce is a final decree which fully and completely dissolves the marriage, despite the pendency of an appeal, under Nevada domestic relations law), *cert. denied*, 423 U.S. 1033 (1975).

³⁵ See *Pereira v. United States*, 347 U.S. 1 (1954); *Freeman v. State*, 786 S.W.2d 56 (Tex. Ct. App. 1990).

³⁶ *United States v. Lilley*, 581 F.2d 182 (8th Cir. 1978).

³⁷ The New York Court of Appeals has held that the CCP protected a suicide note received by the decedent's spouse after the victim's death, because the communication was made during marriage. See *In re Vanderbilt* (Rosner-Hickey), 439 N.E.2d 378 (N.Y. 1982).

those couples engaged to be married.³⁸ Similarly, courts have unanimously rejected claims of marital privilege by putative spouses.³⁹

Although persuasive arguments have been made for extending testimonial privileges beyond the confines of the marital relationship to unmarried cohabitants,⁴⁰ such arguments fall beyond the scope of the marital privileges, which are addressed to marital relationships only.⁴¹ Thus, federal courts, following Federal Rule of Evidence 501's mandate that marital privileges should be construed narrowly, have refused to extend the marital privileges to unmarried

³⁸ See, e.g., *People v. Stanford*, 242 N.W.2d 56 (Mich. App. 1976) (denying the ATP to an engaged couple). For a discussion of the required marital relationship, see *STONE & LIEBMAN, supra* note 29, at § 5.03.

³⁹ See *People v. Dake*, 8 Cal. Rptr. 283 (Cal. Ct. App. 1960); see also *United States v. Neeley*, 475 F.2d 1136 (4th Cir. 1973) (denying the CCP to defendant's fifth and sixth wives when defendant was still legally married to third wife); *United States v. McElrath*, 377 F.2d 508 (6th Cir. 1967) (denying marital privilege to an otherwise valid common-law marriage when the wife was still legally married to a previous husband); *People v. Mabry*, 455 P.2d 759 (Cal. 1969) (denying privilege when marriage to defendant was void because witness's divorce from previous marriage was not yet final), *cert. denied* 406 U.S. 972 (1972).

⁴⁰ See, e.g., Deborah A. Ausburn, Note, *Circling the Wagons: Informational Privacy and Family Testimonial Privileges*, 20 GA. L. REV. 173 (1985) (calling for a privilege that extends to the entire nuclear family); *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1588-92 (1985) (proposing a broader privilege based on intimacy of relationships to include unmarried cohabitants, parent-child relationships, homosexual lovers, and intimate friends) [hereinafter *Developments in the Law*].

Numerous proposals have suggested extension of the testimonial privileges, at least to parent-child relationships, under a broader relational privilege. See, e.g., J. Tyson Covey, Note, *Making Form Follow Function: Considerations in Creating and Applying a Statutory Parent-Child Privilege*, 1990 U. ILL. L. REV. 879, 913; Robert L. Maxwell, Comment, *The Parent-Child Privilege*, 1984 B.Y.U. L. REV. 599 (1984); *Developments in the Law, supra*, at 1575-77. A few states and two federal courts currently provide for a parent-child privilege. See IDAHO CODE § 9-203(7) (1990); MINN STAT § 595.02(i) (1988); *In re Agosto*, 553 F. Supp. 1298, 1325 (D. Nev. 1983) (granting privilege to son not to testify against his father); *In re Greenberg*, 11 FED. R. EVID. SERV. (Callaghan) 579, 582-84 (D. Conn. 1982) (allowing mother to refuse to testify against daughter based on religious grounds); *People v. Fitzgerald*, 422 N.Y.S.2d 309 (Westchester Cty. Ct. 1979) (basing the parent-child privilege on a constitutional right of privacy).

⁴¹ For a discussion of issues involved in extending a privilege to unmarried cohabitants, see Teri S. O'Brien, Comment, *The Husband-Wife Evidentiary Privileges: Is Marriage Really Necessary?*, 1977 ARIZ. ST. L.J. 411 (concluding that marital privileges should not extend to unmarried cohabitants, because doing so would not serve the policy behind the privileges and would run counter to truth-seeking).

cohabitants.⁴² Similarly, state courts have refused to grant the privileges to unmarried cohabitants.⁴³

⁴² In *In re Grand Jury Proceedings Witness Ms. X*, 562 F. Supp. 486 (N.D. Cal. 1983), the court held that although the policy of promoting marital accord was increasingly recognized in nonmarital settings, it did not outweigh the public's right to evidence in criminal investigations. *Id.* at 488. Ms. X received a grand jury subpoena to testify regarding her domestic partner, Mr. Y, with whom she had lived for six and a half years and with whom she had two children. The court acknowledged that courts must afford greater recognition to nonformalized relationships but found that the grand jury arena was not the proper place to recognize such a change in the law. *Id.* at 487. The court concluded: "Courts are careful to construe recognized privileges narrowly and to adopt new privileges with extreme caution." *Id.*

⁴³ Unmarried cohabitants seeking to enjoy the protection of marital privileges have asked courts to extend the reasoning of *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (holding that an unmarried cohabitant of actor Lee Marvin could state a claim for distribution of his property based on express or implied contract theory). Such efforts have failed. In *People v. Delph*, 156 Cal. Rptr. 422 (Cal. Ct. App. 1979), a California appellate court denied a marital privilege and distinguished *Marvin* by pointing out that *Marvin* did not resurrect the doctrine of common-law marriage in California, but rather limited its holding to property rights based on contract law and equitable interests. *Id.* at 425; accord *Witness Ms. X*, 562 F. Supp. at 487-88 (limiting its reading of *Marvin* to the area of property rights upon dissolution of marriage). The *Delph* court added that *Marvin* did not "signal [] a general elevation of meretricious relationships themselves to the level of marriages for any and all purposes." 156 Cal. Rptr. at 425. Ultimately, said the court, it is up to the legislature to decide whether such relationships, because of their commonness in society, deserve statutory protection. In *Delph*, the prosecution called Ms. James, who had lived with Delph for four years and had a child by him, to testify whether she had seen Delph make, or was told that he made, bomb threats. Delph asserted the ATP and the CCP. The court denied the privileges and held that couples living together with all the trappings of marriage but without a formal ceremony could not enjoy the protections of the marital privileges. *Id.* at 425.

Efforts by unmarried cohabitants to claim the marital privileges under an equal protection theory have failed as well. In *State v. Watkins*, 614 P.2d 835 (Ariz. 1980), defendant Watkins claimed that Arizona's marital privilege statute, ARIZ. REV. STAT. ANN. § 13-4062 (1989), which applied only to ceremonially married individuals, violated the equal protection rights of nonmarried individuals in de facto marriages. After Watkins and an individual named Law had a fight, Watkins told his live-in companion, Pritchard, that he would kill Law. Later, Watkins fought with Pritchard and severely beat her, after which he killed Law. At Watkin's trial for murder and aggravated assault, Pritchard testified against him. The couple did not attempt to claim that they had a common-law marriage, because they did not consider themselves married or hold themselves out as married. However, the couple believed that they had a de facto marriage because of their representations that they lived together, had sexual relations, and pooled living expenses. The *Watkins* court upheld the statute as rationally related to legitimate state interests in (1) limiting the application of the privileges to those relationships worthy of protection and (2) orderly administration of law by preventing the extension of the privileges to less permanent relationships, which would necessitate factual inquiries to distinguish de facto marriages from casual alliances. 614 P. 2d at 840. The court stated that acceptance of the doctrine of de facto marriages would require a case-by-case determination based on such intangible factors as intimacy, commitment, and stability. Ultimately, however, the *Watkins* court, like the *Delph* court, held that it is up to the legislature to decide whether de facto marriages deserve statutory protection. *Id.* The court noted that disparity of treatment between married couples and unmarried couples does not burden a constitutional right, because extension of the ATP to de facto marriages is unrelated to the constitutional requirement of a fair trial. Thus, the state did not have to present a compelling interest.

B. Common-Law Marriages

The marital privileges apply to common-law marriages, but only if such a marriage is recognized by the state of residence⁴⁴ and validly established under state law.⁴⁵ In the leading case, *United States v. Lustig*,⁴⁶ the Court of Appeals for the Ninth Circuit assumed the existence of a common-law marriage under traditional common-law marriage principles because the defendant and his partner lived together for seven years, had two children together, and held themselves out as husband and wife. The court, however, denied the couple both of the marital privileges because each privilege depends on the existence of a legal marriage under state law, and Alaska did not recognize common-law marriages.⁴⁷

C. Sham Marriages

Sham marriages—those entered into fraudulently—find their way into marital privilege jurisprudence in one of two ways. First, courts and legislatures may deny the marital privileges to those marriages entered into fraudulently for a purpose other than fraud upon the court, such as to defraud the Immigration and Naturalization Service.⁴⁸ Second, courts and legislatures may deny the marital

⁴⁴ *United States v. Lustig*, 555 F.2d 737 (9th Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978).

⁴⁵ *Schirato v. State*, 391 S.E.2d 116 (Ga. 1990) (denying the ATP to witness who could not prove common-law marriage to defendant).

⁴⁶ 555 F.2d 737. In his trial for possession, distribution, and conspiracy to distribute cocaine, Lustig testified that he did not distribute cocaine to codefendant Pederson. In rebuttal, the prosecution called Newton, Lustig's common-law wife (under traditional common-law principles) of seven years, to testify that she knew that Lustig and Pederson had agreed to distribute cocaine.

⁴⁷ *Id.* at 747-48; *accord* *United States v. White*, 545 F.2d 1129, 1130 (8th Cir. 1976) (denying marital privilege because Arkansas did not recognize common-law marriage); *People v. Torres*, 394 N.Y.S.2d 546 (N.Y. Sup. Ct. 1977) (denying the CCP to a couple who considered themselves married because they had a child and lived together; the court pointed out that neither of the couple's past residences (New York or Puerto Rico) recognized common-law marriages).

Lustig also rejected the couple's claim to the CCP by holding that the witness's observations of Lustig's narcotics transactions did not concern communications nor were the communications confidential, because third parties were present. 666 F.2d at 748.

⁴⁸ "In a sham, phony, empty ceremony . . . the reason for the rule disqualifying a spouse from giving testimony disappears, and with it the rule." *Lutwak v. United States*, 344 U.S. 604, 615 (denying the ATP to defendant, a World War II veteran, who married his wife for the sole purpose of bringing her into the United States under the Alien War Brides Act which was in direct violation of 8 U.S.C. § 180(a) (1988) and 18 U.S.C. § 1546 (1984)), *reh'g denied*, 345 U.S. 919 (1953). However, the dissent in *Lutwak* strongly criticized the rule because it allows the trial court to use the very testimony—the admissibility of which is in question—to determine whether a sham took place: "The Court's position seems to be that privileged testimony may be received to destroy its own privilege. We think this is not allowable, for the same reason that one cannot lift himself by his own bootstraps." *Id.* at 622 (Jackson, J., dissenting).

privileges to those marriages entered into as a fraud on the court, for example, when the couple marries solely for the purpose of raising marital privilege.⁴⁹

When raising the sham-marriage doctrine to object to the preclusion of spousal testimony, the opponent of the privilege offers evidence of fraud in an *in camera* proceeding or pretrial hearing.⁵⁰ Factors indicating a sham include evidence that the couple never consummated the marriage,⁵¹ that the couple does not live together and has no plans to do so,⁵² or that one spouse threatened the other into marriage.⁵³

Courts disagree over whether suspicious timing of a marriage proves fraud. Older cases traditionally held that suspicious timing cannot alone create an inference of fraud.⁵⁴ While some recent cases continue to hold that suspicious timing can be a factor in a finding of fraud but cannot, by itself, create an inference of fraud,⁵⁵ the Alaska Supreme Court in 1981 denied the ATP despite the absence of an explicit sham-marriage finding.⁵⁶ The court pointed to

⁴⁹ See *United States v. Saniti*, 604 F.2d 603 (9th Cir.), *cert. denied*, 444 U.S. 969 (1979).

⁵⁰ See *id.* (holding that the trial court's determination, as a finding of fact upon an evidentiary hearing that the marriage ceremony was entered into solely for the purpose of invoking the marital privilege and thus not in good faith, will not be set aside unless clearly erroneous). *But see Ricarte v. State*, 717 S.W.2d 488 (Ark. 1986) (reversing the trial judge's denial of the adverse testimonial privilege, when the trial judge determined that the marriage, entered into three days before trial, should not create a privilege).

⁵¹ See *Lutwak*, 344 U.S. at 613.

⁵² See *id.* at 611; *In re Grand Jury Proceedings*, 777 F.2d 508 (9th Cir. 1985).

⁵³ See *United States v. Apodaca*, 522 F.2d 568, 571 (10th Cir. 1975) (denying the ATP to defendant who threatened to kill the witness if she testified against him; trial court conditioned defendant's bail on not contacting the witness, yet the defendant contacted the witness and then married her three days before trial); see also *United States v. Mathis*, 559 F.2d 294 (5th Cir. 1977) (noting that when defendant promised former wife \$25,000 and custody of their child if she would remarry him, and when she later received an anonymous phone call threatening to kill her baby, the evidence indicated a fraud on the court).

⁵⁴ See *San Fratello v. United States*, 340 F.2d 560, 566, *reh'g denied*, 343 F.2d 711 (5th Cir. 1965) (fact that defendant married the witness after commission of the offense and a short time before trial, even if for the possible reason of suppressing testimony, did not negate marital privilege) (*dicta*). See also *State v. Chrismore*, 274 N.W. 3 (Iowa 1937) (holding that when the proponent proves a legal marriage the motive for entering it is irrelevant); *Moore v. State*, 75 S.W. 497 (Tex. Crim. App. 1903) (believing itself constrained by statute, the court granted the privilege despite evidence that the marriage was entered into one day prior to trial solely to suppress testimony).

⁵⁵ See *In re Grand Jury Proceedings*, 777 F.2d at 508 (suspicious timing of marriage five days before trial did not negate marital privilege, when other evidence, including concessions by the government that the couple lived together before and after marriage and married as a natural progression of their love and affection for each other, indicated that the marriage was entered into in good faith).

⁵⁶ *Osborne v. State*, 623 P.2d 784 (Alaska 1981).

the suspicious timing of the marriage and the defendant's strong motive to exclude the testimony.⁵⁷

The sham-marriages doctrine creates the only context in which a court may deny marital privileges to otherwise legally married spouses. A court does not contradict state domestic relations law when it denies the marital privileges to sham marriages, because under state domestic relations law a sham marriage is invalid. Just as courts may deny the privileges of contract to parties who fraudulently enter into an agreement, so too may courts deny the marital privileges to those who fraudulently enter into marriage. Further, protection of fraudulent marriages does not square with the purposes of the privileges: to protect marital harmony and communications in marriages entered into for the reasons contemplated in state marriage statutes.⁵⁸

III

IMPROPER LIMITATIONS ON MARITAL PRIVILEGES THROUGH PRESUMPTIONS AND DOCTRINES OF WORTHINESS

In recent years, courts and legislatures have narrowed the marital privileges after making inferences based on certain fact patterns, even though those inferences contradict the privileges' purposes. These inferences fall into one of two categories: inferences that the marriage is unworthy of the privilege, and inferences that a marriage is invalid even when the marriage complies with all the formalities of the state's marriage statute. The first category encompasses the *Trammel* rule and the marital viability doctrine. The second category covers the premarriage acts exception.

A. *Trammel* Rule

In some respects, the *Trammel*⁵⁹ rule—that only the witness-spouse can raise the ATP in a federal criminal trial—creates a narrow departure from precedent because it only addresses the ATP

⁵⁷ *Id.* Defendant's attorney organized a marriage ceremony for the defendant and the principal witness against the defendant fifteen minutes prior to a hearing on the state's motion to enjoin the issuance of a marriage license. The court concluded: "[To allow the privilege here would] exalt[] form over substance, and [] asks us to blind ourselves to the probable underlying motivation for the marriage. In these circumstances no affirmative proof of fraud needs to be adduced." *Id.* at 787.

⁵⁸ One commentator points out that in a fraudulent marriage, marital harmony likely does not exist. See Patricia Boies, *The Husband-Wife Privilege in Federal Courts*, 59 B.U. L. REV. 894, 905-07 (1979).

⁵⁹ *Trammel v. United States*, 445 U.S. 40 (1980). Otis and Elizabeth Trammel were involved in a heroin importing operation. On a stopover in Hawaii, Elizabeth Trammel was arrested by Drug Enforcement Agents and asked to testify against Otis Trammel. She agreed. *Id.* at 42.

and its application in federal criminal proceedings. However, *Trammel's* implications reach more broadly.

1. *Pre-Trammel Background*

Prior to 1980, either the witness-spouse or the defendant-spouse could raise the ATP in federal criminal proceedings. In the 1958 case of *Hawkins v. United States*,⁶⁰ the Supreme Court expressly upheld the practice of allowing the defendant-spouse to prevent the witness-spouse from testifying when the witness-spouse wished to testify. Rejecting the federal government's argument that a witness-spouse's willingness to testify against the other spouse indicates that the marriage is in such a state of disrepair that the ATP cannot advance marital harmony, the Court found that adverse testimony, whether compelled or voluntary, would disturb marital harmony.⁶¹ The Court stated that, in reality, voluntary testimony by one spouse would likely cause *more* bitterness on the part of the other spouse.⁶² According to Justice Black's opinion, marriages could weather "flare-ups in which one spouse wants to hurt the other," but no marriage could endure the "unforgivable" act of one spouse testifying against the other.⁶³

2. *Trammel*

Twenty-two years after *Hawkins*, the Court re-examined this issue in *Trammel v. United States*.⁶⁴ Voicing strong disapproval of the ATP in general,⁶⁵ the Court upheld the existence of the privilege but modified it as the government had urged in both *Hawkins* and *Trammel*.⁶⁶ According to the Court, when a spouse wishes to testify

⁶⁰ 358 U.S. 74 (1958). *Hawkins* was prosecuted for interstate transportation of a girl for immoral purposes, after he drove a young woman from Arkansas to Oklahoma to engage in prostitution. The prosecution offered the testimony of *Hawkins's* wife to contradict *Hawkins's* claim that prostitution was not the motivation.

⁶¹ *Id.* at 77.

⁶² *Id.*

⁶³ *See id.* at 77-78:

[N]ot all marital flare-ups in which one spouse wants to hurt the other are permanent. The widespread success achieved by courts throughout the country in conciliating family differences is a real indication that some apparently broken homes can be saved provided no unforgivable act is done by either party. Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage.

⁶⁴ 445 U.S. 40 (1980).

⁶⁵ *Id.* at 48 ("[T]he law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggests the need for change.").

⁶⁶ In explaining its justification for reversing its own relatively recent decision in *Hawkins*, the Court pointed to the need to construe the marital privileges narrowly because they undermine truth-seeking. The Court also asserted that a court-made rule may be altered when it no longer serves its purpose: "When precedent and precedent

voluntarily, the marriage is certainly in a state of disrepair with little marital harmony to preserve.⁶⁷ As such, allowing the privilege to block testimony would frustrate justice more than it would foster family peace.⁶⁸ The Court believed that its modified privilege would further the important public interest in marital harmony without burdening legitimate law enforcement needs.⁶⁹ Thus, in federal criminal proceedings, the ATP is currently available only to the witness-spouse, who may neither be compelled to testify by the government nor foreclosed from testifying by the defendant-spouse.⁷⁰ Thus, the *Trammel* modification protects only those marriages that the witness-spouse seeks to protect.

The Court went further, asserting that denying the witness-spouse the opportunity to testify could itself lead to marital discord and resentment because application of the old privilege would prevent the witness-spouse from making a deal with the government in cases in which the spouse is a codefendant; thus the defendant-spouse could escape justice while the witness-spouse suffered.⁷¹

The Court also implied that the defendant-spouse invokes the privilege to save him or herself, and not to save the marriage. According to the Court, between the defendant- and the witness-spouse, the witness-spouse would more likely consider the peace of the marriage before deciding whether to invoke the privilege.⁷²

Under *Trammel*, witness-spouses may testify provided they do so voluntarily. But *Trammel* offers a broad definition of voluntariness. As long as the witness-spouse has actual, if not practical, alternatives

alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to destroy it.'" *Id.* (quoting *Francis v. Southern Pac.*, 333 U.S. 445, 471 (1948) (Black, J., dissenting)). Justice Stewart's concurring opinion, however, questioned how reason and experience could have worked such a vast change since 1958. *Id.* at 53. Justice Stewart also asserted that the modified rule "obliterated" the ATP. *Id.* at 54.

⁶⁷ *Trammel*, 445 U.S. at 52.

⁶⁸ *Id.*

⁶⁹ *Trammel*, 445 U.S. at 53.

⁷⁰ Some states have opted not to follow *Trammel*. See, e.g., *In re Marriage of Bozarth*, 779 P.2d 1346, 1350 (Colo. 1989) (construing COLO. REV. STAT. § 13-90-107 (1989)).

⁷¹ *Id.* at 52-53. However, the *Trammel* Court ignored the freedom of the witness-spouse and the government to make a deal concerning cooperation outside of the courtroom under the old rule. This undercuts the argument that application of the unmodified privilege favors the defendant-spouse. Cf. *Trammel*, 445 U.S. at 52 n.12. Further, it is unclear whether one who has reason to fear a criminal prosecution has a right to make a deal or that such a right outweighs the policies behind the ATP. See Richard Lempert, *A Right to Every Woman's Evidence*, 27 LAW QUADRANGLE NOTES 27(2), 31-33 (1983) (suggesting that the witness-spouse who is unable to make a deal is no worse off than the criminal foolish enough not to recruit an accomplice who can be betrayed later in exchange for a deal).

⁷² *Trammel*, 445 U.S. at 49 n.10 (citing 1 CAL. LAW REV. COMM'N, RECOMMENDATION AND STUDY RELATING TO THE MARITAL 'FOR AND AGAINST' TESTIMONIAL PRIVILEGE, at F-5 (1956)).

to testifying, the testimony will be deemed voluntary. Thus, when the government gives unindicted coconspirators promises of leniency and grants of use immunity in return for testimony against their spouses—as the government did in *Trammel*—the spouses' testimony is not involuntary.⁷³

The reasoning of *Trammel* is questionable because *Trammel* presumes a marriage is beyond repair simply because one spouse wishes to testify against the other. To the contrary, the stress of a criminal prosecution may itself cause the marital rift that leads one spouse to testify against the other. But that does not necessarily indicate the end of the marriage. Not all marital flare-ups end in divorce. *Trammel* requires the defendant not only to maintain the energy to put up a defense, but also to maintain a happy marriage. *Trammel's* facts themselves do not present a clear example of the type of marital disrepair that the *Trammel* rule addresses: did Elizabeth Trammel testify against Otis Trammel because their marriage was beyond repair, or because the government promised leniency and she perhaps hoped Otis would understand and forgive

⁷³ *Trammel*, 445 U.S. at 53. One might ask, however, whether testimony given to avoid indictment can reasonably be called voluntary. If so, then very few situations, short of testimony compelled by the court upon threat of contempt, would be involuntary.

Justice Stewart's concurring opinion in the earlier *Hawkins* case foreshadowed such problems in modifying the ATP to allow the witness-spouse to testify voluntarily:

[S]uch a rule would be difficult to administer and easy to abuse. Seldom would it be a simple matter to determine whether the spouse's testimony were really voluntary, since there would often be ways to compel such testimony more subtle than the simple issuance of a subpoena, but just as cogent.

Hawkins v. United States, 358 U.S. 83 (1958). It is not clear whether the *Trammel* rule would find the testimony at issue in *Hawkins*, voluntary when the defendant's wife was imprisoned as a material witness and later released upon a \$3000 bond conditioned on her appearance as a witness.

For a proposal arguing that an opportunity should be given to the defendant-spouse to challenge the voluntariness of the witness-spouse's testimony, see Tom Glassberg, *Adverse Spousal Privilege: Dead or Alive?*, 63 WASH. U. L.Q. 509 (1985).

One commentator uses the concept of voluntariness to support his call for the abolition of the ATP altogether, claiming that, in the absence of the privilege, no marriage would suffer the ill effects of adverse testimony since both spouses would know that the government is to blame for compelling the testimony. See Medine, *supra* note 32, at 557. The author asserts that in most cases, the defendant-spouse could not expect the witness-spouse to face contempt charges. But, as Medine admits, this justification only applies when the testimony will not be very damaging and the potential punishment for the defendant will not be great. *Id.* at 557.

her?⁷⁴ As noted by one commentator, the *Trammel* rule gives the government an incentive to break up marriages.⁷⁵

Rather than attacking the ATP directly by determining that the public interest in truth-seeking outweighs marital protection at trial, *Trammel* achieved a similar result by limiting the number of marriages eligible for the ATP. However, it is far from clear that *Trammel* successfully distinguishes between harmonious and failed marriages. Further, even if the *Trammel* rule does successfully make this distinction, the ATP does not require that courts determine which marriages are harmonious enough to be eligible for protection. The ATP protects *future* harmony, regardless of the present state of harmony. *Trammel's* notion that bad marriages are not worth protecting runs contrary to the ATP's purpose and to state domestic relations law. The ATP does not protect only those marriages that are already harmonious; the ATP strives to foster *future* marital harmony regardless of the present state of the marriage.⁷⁶

The *Trammel* Court contradicted another purpose of the ATP by ignoring the "natural repugnance" rationale.⁷⁷ When a spouse willingly testifies against his or her spouse, the natural repugnance of spouses acting adversarially is probably greater than when the court compels the spouse to testify. Hence, the second purpose behind the ATP argues against the *Trammel* modification.

Finally, *Trammel* contradicts domestic relations law by implying a marriage is not worthy of ATP protection when a spouse is willing to testify against the other spouse. Under those laws, a marriage

⁷⁴ Apparently, in the case of the Trammels, the marriage was in fact in disrepair. When questioned about the possibility of a divorce, Otis said, "I would go my way, and [she] would go [hers]." *Id.* at 42 n.1. However, the record does not indicate whether this marital discord existed prior to arrest, or whether the government's efforts to recruit Elizabeth caused the dissension. The facts seem to indicate the latter, because Elizabeth made her deal soon after her arrest; hours prior to that she had been with Otis in Thailand apparently making heroin purchases with him. Her efforts on his behalf prior to her arrest, although no absolute proof existed, would seem to indicate that their marriage was in good condition.

⁷⁵ Lempert, *supra* note 71, at 32; see also Jaymi Zwain, *Evidence—Privilege Against Adverse Spousal Testimony—In a Federal Criminal Proceeding Choice of Whether to Testify Against a Defendant Spouse Belongs to Witness Spouse Alone*, 55 TUL. L. REV. 961, 969 (1981) (suggesting that prosecutorial pressure and marital disharmony may equally cause a witness-spouse to decide to testify). To counter such arguments, the *Trammel* Court pointed out that even under the pre-*Trammel* privilege, the government could make a deal with witness-spouses in return for nontestimonial cooperation. 445 U.S. at 52 n.12. But by acknowledging the possibility of nontestimonial cooperation, the Court undercuts its own argument that, under the pre-*Trammel* rule, a witness-spouse was unfairly denied the opportunity to make a deal. See *supra* note 67.

⁷⁶ See *United States v. Byrd*, 750 F.2d 585, 590 (7th Cir. 1984) ("[The ATP] looks forward with reference to the particular marriage at hand: the privilege is meant to protect against the impact of the testimony on the marriage.").

⁷⁷ For discussion of the natural repugnance rationale, see *supra* note 22.

plagued with disharmony still exists legally and still carries with it all the privileges and immunities granted to married persons. By not automatically voiding disharmonious marriages, domestic relations law implicitly recognizes that in many situations, reconciliation is possible.⁷⁸ *Trammel* thus creates a split between federal marital privilege jurisprudence and state domestic relations laws.⁷⁹

Trammel has had far-reaching effects. In addition to the states that have subsequently adopted the rule by statute,⁸⁰ many courts have accepted *Trammel* as a mandate to further narrow the marital privileges, using their own views to determine whether a marriage is worthy of the marital privileges' protection.⁸¹

B. Viability Doctrine

Under the "viability doctrine,"⁸² courts have exceeded the boundaries of state domestic relations law and have denied the marital privileges to marriages deemed nonviable or moribund, even though still legally valid and not entered into fraudulently.⁸³ Because legislatures would be understandably reluctant to tamper with their own domestic relations law, the marital viability doctrine is

⁷⁸ See *Chan v. Bell*, 464 F. Supp. 125, 130 n.12 (D.D.C. 1978).

⁷⁹ This would seem to contradict *Trammel's* own statement: "[T]he laws of marriage and domestic relations are concerns traditionally reserved to the states." *Trammel*, 445 U.S. at 50.

⁸⁰ See, e.g., HAW. REV. STAT. § 626-1, Evid. Rule 505(a) (1988) (citing *Trammel* in the statute's commentary); see also UNIF. R. EVID. 504 (1974) (adding an ATP in 1986 in the form of the *Trammel* rule, where previously only a CCP was accommodated).

⁸¹ See, e.g., *In re Witness Before Grand Jury*, 791 F.2d 234 (2d Cir. 1986) (citing *Trammel* in support of its denial of both marital privileges to a marriage held moribund, nonviable, and nonvital even though the spouses had not even entered into a legal separation).

⁸² Courts do not explicitly refer to this method of adjudication as the "viability doctrine." However, as the cases in this section show, courts use the word "viable" frequently enough for this author to refer to the method as the "viability doctrine."

⁸³ See Jeffrey Jones, *Federal Marital Privileges in a Criminal Context: The Need for Further Modification Since Trammel*, 43 WASH. & LEE L. REV. 197, 220 (1986) (calling for greater court involvement in identifying only those viable marriages worth preserving and therefore deserving of the marital privileges).

The viability doctrine has also developed in relation to the joint participants exception, which, in some states and federal circuits, denies the ATP or the CCP to spouses who jointly participate in crime. Although the exception primarily seeks to deny criminals the opportunity to suppress testimony by recruiting their spouses, at least one court has also justified the exceptions on the grounds that a marriage in which both spouses jointly participate in crime is likely unstable and therefore undeserving of the privileges. *United States v. Van Drunen*, 501 F.2d 1393, 1397 (7th Cir.) (implying that a marriage where spouses jointly participate in a crime is not a happy, positive marriage and can therefore have no rehabilitative effect on the defendant), *cert. denied*, 419 U.S. 1091 (1974). Other courts reject this justification for the exception, refusing to find that a marriage between joint participants in crime is any less happy or any more likely to disintegrate than a marriage in which the spouses do not jointly participate in crime. See *In re Grand Jury Subpoena United States*, 755 F.2d 1022, 1026 (2d Cir. 1985), *vacated as*

largely a judicial creation.⁸⁴ This Note asserts that courts act improperly when they decide that a marriage is beyond repair, even though domestic relations law leaves that decision to the couple.

One commentator has identified two problems inherent in court determinations of marital viability.⁸⁵ First, courts generally lack the expertise to determine whether a marriage has deteriorated to the point that it does not deserve protection.⁸⁶ Second, courts finding a marriage not viable have failed to articulate clear standards for viability, thus allowing judges in later cases to rule—according to their own prejudices—how harmonious a marriage must be in order to qualify for the marital privileges.⁸⁷

Prior to *Trammel*, courts generally recognized the problems inherent in defining viable marriages. In *United States v. Walker*,⁸⁸ Chief Judge Learned Hand declared that an inquiry into whether the marriage was “wrecked” would complicate the trial seriously, despite evidence in that case that the marriage was a sham.⁸⁹ Thus, the court upheld the common-law rule that removed the privileges only upon divorce or death. In a more recent case, *United States v. Lilley*,⁹⁰ the Court of Appeals for the Eighth Circuit refused to condition the ATP upon a finding that the marriage was a happy one,

moot sub nom. *United States v. Koecher*, 475 U.S. 133 (1986) (without opinion); *Appeal of Malfitano*, 633 F.2d 276, 278 (3d Cir. 1980).

For critical analysis of the joint participants exception, see Amy Bermingham, *Partners in Crime: The Joint Participants Exception to the Privilege Against Adverse Spousal Testimony*, 53 *FORDHAM L. REV.* 1019 (1985) (arguing that *Trammel* renders the exception meaningless, and that the exception creates double punishment for the couple); James McKevenin, *The Joint Participants Exception to the Marital Testimonial Privilege: Balancing the Interests “In the Light of Reason and Experience,”* 19 *IND. L. REV.* 645, 655 (1986) (noting that the exception implies that conspirator marriages should be dissolved since they supposedly lack social value).

Every federal circuit addressing the issue has adopted a joint participants exception to the CCP, denying the privilege to communications in furtherance of criminal activity. See *United States v. Marashi*, 913 F.2d 724, 730 (9th Cir. 1990) (collecting cases in each circuit establishing the exception).

⁸⁴ No state’s domestic relations law acknowledges the existence of a viability standard. See *Chan v. Bell*, 464 F. Supp. 125, 131 (D.D.C. 1978) (“[N]ot a single jurisdiction in the United States has ever defined marriages in terms of their stability or viability as distinguished from their lawful creation and their dissolution by a court of law.”). A review of state domestic relations law since 1978 shows that *Chan*’s summary of state law is still true today.

⁸⁵ *Medine*, *supra* note 32, at 532-33.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 176 F.2d 564, 568 (2d Cir.), *cert. denied*, 338 U.S. 891 (1949). For a discussion of *Walker*, see *Boies*, *supra* note 58, at 907.

⁸⁹ *Id.* at 568. The defendant had married the witness and two other women to fraudulently obtain their money.

⁹⁰ 581 F.2d 182 (8th Cir. 1978). In *Lilley*, the defendant’s husband was permitted to testify that the defendant had committed forgery. That ruling was held to be error, leading to the reversal of the verdict against the defendant. *Id.* at 189.

claiming that requiring such a finding would place too great a burden on judicial administration.⁹¹ In 1989, the Michigan Supreme Court also refused to condition the CCP on a finding of viability at the time of spousal communication.⁹²

Other courts, however, have ignored the concerns raised by *Walker* and *Lilley* and have denied the marital privileges to marriages deemed nonviable. One of the earliest cases in this line, *United States v. Fisher*,⁹³ held that the couple's marriage was ended by a previous divorce. But the *Fisher* court also held that, even in the absence of a divorce, the ATP still would not have attached, because the couple had been separated for years, and the husband had been living with another woman with whom he had two children. The court also pointed to the husband's own statement that he and his wife had little chance for reconciliation.⁹⁴

In another pre-*Trammel* decision, *United States v. Cameron*,⁹⁵ the Court of Appeals for the Fifth Circuit also denied the ATP to an allegedly nonviable marriage, although the evidence of nonviability was weaker than that in *Fisher*. Explicitly limiting its holding to the facts of the case, the court ruled that the privilege would not serve the purpose of promoting marital harmony between the Camerons. The court was careful to note that the evidence supported a finding that the marriage was no longer viable and that the spouses had little hope for reconciliation: the couple had lived together for only two weeks following their marriage, after which the husband moved in with a former girlfriend who gave birth to his child. Finding that as a "social fact" the marriage had expired and was moribund, the court stated, "[The marriage was] a sordid and stormy one, and

⁹¹ *Id.* at 189; see also *People v. Fields*, 328 N.Y.S.2d 542 (N.Y. App. Div.) (granting the ATP because of administrative difficulties involved in determining viability), *aff'd*, 289 N.E.2d 557 (N.Y. Ct. App. 1972). *Coleman v. State*, 380 A.2d 49 (Md. 1977), followed *Fields*, holding that: "Absent a statutory provision to the contrary, application of the privilege does not depend on the stability of the marriage." *Id.* at 49.

⁹² *People v. Vermeulen*, 438 N.W.2d 36 (Mich. 1989). For a discussion of *Vermeulen*, see William Hoey, *Privilege for Confidential Spousal Communications under Section 2162 of the Revised Judicature Act of 1961 Applies Regardless of Marital Disharmony; Only Communications Made Subsequent to Final Divorce are Excluded*, 67 U. DET. L. REV. 131 (1989).

⁹³ 518 F.2d 836 (2d Cir.), *cert. denied*, 423 U.S. 1033 (1975).

⁹⁴ As further proof of the marriage's deterioration, the court noted that after the defendant was denied the privilege, defendant's counsel attempted to counter Rosalie Fisher's testimony by saying in closing argument: "He rejected her. They have been married for some time and now he is remarried and the father of two wonderful children. . . ." *Id.* at 840. However, one should question the fairness of using the defendant's attack on his wife's testimony as proof that the privilege should not have been granted when the attack was made necessary by the court's previous denial of the privilege.

⁹⁵ 556 F.2d 752 (5th Cir. 1977).

the couple by the time of trial were [sic] separated, probably permanently."⁹⁶

Two years after *Cameron*, the Court of Appeals for the Eighth Circuit, in *United States v. Brown*,⁹⁷ disregarded the caution it had urged in *Lilley* and cited the holding of *Cameron* to justify its own denial of the ATP.⁹⁸ The *Brown* court based its denial of the privilege largely on the fact that codefendant Clincy and his wife did not see each other for eight months prior to trial.⁹⁹ Despite the Fifth Circuit's insistence that *Cameron* was limited to its facts and based upon a clear evidentiary finding,¹⁰⁰ the *Brown* court focused largely on only one of the factors listed in *Cameron*, and failed to reveal the evidentiary standard applied.

Contrary to *Brown's* implication, courts should strive to preserve marital harmony as long as reconciliation is possible. Until reconciliation is no longer possible, the marriage continues, as do the reasons for protecting it. *Brown's* most disturbing feature is its failure to address the possibility of reconciliation. Common sense suggests that although long separations may not bode well for a marriage, such separations do not necessarily signal the marriage's end or serve as evidence that reconciliation is impossible. *Brown* presumed that, because the spouses were separated for eight months, reconciliation was impossible and thus no marital harmony to protect.

Fisher, *Cameron*, and *Brown* created a need to establish clear evidentiary standards for determining which marriages are not viable. *United States v. Byrd*¹⁰¹ established an easily applied rule defining how long a separation must last to constitute a nonviable marriage. The *Byrd* court held that spouses "permanently separated" at the time of communication could not enjoy the benefits of the CCP.¹⁰² The court justified this rule by declaring that society has no interest in protecting confidentiality between permanently separated spouses.¹⁰³ The court also asserted that its new rule

⁹⁶ *Id.* at 754.

⁹⁷ 605 F.2d 389 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979). The relevant issue in *Brown* was whether defendant Clincy had forged checks with his wife's signature.

⁹⁸ The *Brown* court declared that it is difficult to visualize how protection of the marital bond "would have required the total exclusion of Mrs. Clincy from the witness stand." *Id.* at 396.

⁹⁹ *Id.*

¹⁰⁰ *Cameron*, 556 F.2d at 756.

¹⁰¹ 750 F.2d 585 (7th Cir. 1984). In *Byrd*, defendant Byrd gave his wife a list of stores (which were subsequently burned) and told her to tear it up. After his wife was subpoenaed, he told her not to say anything about the arsons to anyone.

¹⁰² *Id.* at 593; *accord* *United States v. Fulk*, 816 F.2d 1202 (7th Cir. 1987).

¹⁰³ 750 F.2d at 593. The court continued, "The importance of the search for truth at issue in a criminal trial outweighs the interest in protecting separated couples' confidentiality." *Id.*

would remove the administrative burdens of determining whether or not a marriage had deteriorated, because establishing permanent separation requires less intensive fact-finding than establishing deterioration.¹⁰⁴

Though the *Byrd* court established an easily applied rule, the court left unanswered whether its "permanent separation" rule requires a judicial order of separation under state domestic relations law. The *Byrd* court never discussed legal separation and never explained what it meant by "permanent separation." A later case, *In re Witness Before the Grand Jury*,¹⁰⁵ held that *Byrd* did not require a legal separation.¹⁰⁶ Thus, *Byrd* and its progeny created a new definition of marital worth outside the definitions of domestic relations law.

¹⁰⁴ *Id.* at 592.

¹⁰⁵ 791 F.2d 234 (2d Cir. 1986). In that case the witness was called to testify regarding joint checking accounts held by herself and her husband, who was a suspected narcotics dealer. The couple were separated for 12 of the 23 years they had been married.

¹⁰⁶ *Id.* at 238. "The *Byrd* court noted that permanent—and not necessarily 'legal'—separation eliminated the availability of the privilege. . . ."; see also, *United States v. Jackson*, 939 F.2d 625, 627 (8th Cir. 1991) (denying the CCP to a couple permanently separated "without any semblance of a marital relationship" at the time of communication); *United States v. Frank*, 869 F.2d 1177, 1179 (8th Cir.) (citing *Byrd* and denying the CCP to a couple in a "permanent separation" and "defunct marriage," without explaining how the couple in question fit the definition of "permanent separation"), *cert. denied*, 493 U.S. 839 (1989).

Even if *Byrd* required legal separation, legal separation would not necessarily require denial of the marital privileges. One commentator notes that even spouses legally separated are still legally married and may by law reconcile. See Medine, *supra* note 32, at 533.

In one sense, *In re Witness* offers a less rigid approach than *Byrd* to the concept of viability because *In re Witness* held that upon a finding of permanent separation the proponent may counter the privileges' denial by presenting evidence of special circumstances such as the possibility of reconciliation.

The Court of Appeals for the Ninth Circuit formulated its viability standard differently, determining that courts may deny the ATP when a divorce action has been filed, and extrinsic evidence, including evidence of separation and proposals for property settlement, demonstrates that there is no chance of reconciliation. *United States v. Roberson*, 859 F.2d 1376, 1381 (9th Cir. 1988). The Court of Appeals for the Tenth Circuit recently followed *Roberson* in *United States v. Treff*, 924 F.2d 975 (10th Cir. 1991). The court held that the CCP did not apply to a communication between Treff and his wife which the wife recorded in her diary. Treff, accused of attempted murder with a Molotov cocktail, had been separated from his wife since 1985 and was engaged to marry another woman. Treff had also filed for divorce, and the court found no evidence of an attempt at reconciliation. *Id.* at 982.

The Supreme Court of Colorado, however, refused to deny the ATP when a separated couple had gone so far as to file papers in a divorce action, because the marriage had not legally ended by death or dissolution. *In re Marriage of Bozarth*, 779 P.2d 1346, 1351 (Colo. 1989); accord *Coleman v. State*, 380 A.2d 49 (Md. 1977) (privilege exists even when defendant served with divorce papers); see also *Brown v. State*, 401 S.E.2d 492, 495 (Ga. 1991) (rejecting defendant's claim that the privilege did not apply to moribund marriages since the ATP statute, GA. CODE ANN. § 24-9-23 (Michie 1988), makes no such exception for moribund marriages); cf. *In re Witness Before the Grand Jury*, 791 F.2d at 241 (Oakes, J., concurring) (arguing for a bright line standard based on legal separation or divorce).

Under *Byrd*, spouses separated, by court order or otherwise, for some indeterminate amount of time cannot receive the benefits of the marital privileges.

In re Witness expands the viability doctrine by articulating subconscious and unexpressed beliefs of previous courts. According to *In re Witness*, *Trammel*, by denying marital privilege based on a presumption about marital disrepair, invited other courts similarly to deny the privilege based on their own presumptions of what constitutes a disrupted marriage: "*Trammel* and *Fisher* demonstrate that courts may properly inquire into whether a marriage is vital enough to justify recognition of the adverse testimony privilege in each case."¹⁰⁷ According to *In re Witness*, just as *Trammel* presumed the couple's marital disrepair without proof, other courts can also make presumptions about marital disrepair without conclusive proof.¹⁰⁸

Under the viability doctrine, a legal marriage is no longer a prerequisite for a grant of the marital privileges. At its worst, the doctrine gives a judge complete discretion to determine marital viability, often applying ill-defined evidentiary standards based on subjective factors such as happiness or discord.¹⁰⁹ Further, once a trial court denies marital privilege because of marital nonviability, the decision may only be reversed if clearly erroneous.¹¹⁰ At its best, the doctrine demands at least some proof of permanent separation, though not necessarily legal separation, or proof that no chance for reconciliation remains. But even at its best, the doctrine contradicts domestic relations law, under which spouses, not judges, initiate divorce or separation proceedings.¹¹¹

¹⁰⁷ 791 F.2d at 238.

¹⁰⁸ *Id.* at 238. The *In re Witness Before Grand Jury* court said, "The Carters thus present less of a case for a 'valid marriage' than did the couple in *United States v. Byrd* . . ." *Id.* This author assumes the court actually meant "viable" and could not have meant to equate moribund marriages with invalid—i.e., nonlegal—marriages.

In another semantic step, the court also called the Carter marriage not "vital." *Id.* at 247. While "viable" and "vital" have nearly the same definition, the use of the word "vital" nonetheless gives future courts a new rhetorical device for denying marital privileges.

¹⁰⁹ For a discussion of a proposal allowing federal courts to use the same standards for determining viability as used by state divorce courts, see Boies, *supra* note 58, at 912 n.142 (rejecting the proposal because federal courts are not familiar with such procedures, and even when grounds for divorce exist, the couple might not desire a divorce).

Oddly, the Seventh Circuit has used the viability doctrine to make an unfounded presumption of a different nature, denying the ATP to a couple married 40 years on the grounds that their marriage was so stable that it did not need the ATP's protection. *Ryan v. Commissioner*, 568 F.2d 531, 543 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).

¹¹⁰ See *United States v. Apodaca*, 522 F.2d 568, 571 n.3 (10th Cir. 1975); Boies, *supra* note 58 at 912.

¹¹¹ Some courts have recognized the dangers of allowing government agencies, such as the Immigration and Naturalization Service, to determine the viability of a marriage

C. Premarriage Acts Exception

The premarriage acts exception states that the ATP does not apply to testimony concerning matters that occurred prior to the marriage.¹¹² When testimony concerns such matters, a court using the premarriage acts exception irrebuttably presumes the marriage fraudulent.¹¹³

The premarriage acts exception originated in the never-enacted Proposed Federal Rule of Evidence 505,¹¹⁴ which in its proposed list of exceptions to the ATP declared in subsection (c)(2): "There is no privilege under this rule . . . as to matters occurring prior to the marriage. . . ."¹¹⁵ The Advisory Committee Notes explain the rationale behind the exception: "This provision eliminates the possibility of suppressing testimony by marrying the witness."¹¹⁶

*United States v. Van Drunen*¹¹⁷ was the first case to apply the premarriage acts exception. In *Van Drunen*, the defendant married his unindicted co-conspirator, who was slated to be a witness against him, one month after his indictment for illegal transportation of an alien. The court denied the ATP on the alternate grounds that (1) the spouses were joint participants in crime¹¹⁸ and (2) Proposed

in the way *Fisher*, *Cameron*, and *Brown* authorize courts to do so. Under United States immigration law, the spouse of a United States citizen receives automatic permanent resident status after the petitioner has shown a valid marriage. In *Chan v. Bell*, 464 F. Supp. 125 (D.D.C. 1978), the government attempted to deny relative status to the petitioner by calling his marriage "non-viable" which was defined by the Immigration and Naturalization Service as having no chance of continuing. Finding that neither Congress nor any state's domestic relations law recognizes a viability standard, the court called viability an unworkable test that would necessitate investigations into sexual compatibility, financial security, emotional attitudes, and family relations. The words of the court hold equally true in the marital privilege arena: "INS has no expertise in the field of predicting the stability and growth potential of marriages if indeed anyone has—and it surely has no business operating in that field." *Id.* at 130.

¹¹² An exception to the CCP for communications prior to marriage would be unnecessary, since by definition that privilege only applies to communications during marriage. See *Garcia-Jaramillo v. INS*, 604 F.2d 1236 (9th Cir. 1979), *cert. denied*, 449 U.S. 828, *reh'g denied*, 449 U.S. 1026 (1980); *United States v. Pensinger*, 549 F.2d 1150 (8th Cir. 1977); *Volianitis v. INS*, 352 F.2d 766 (9th Cir. 1965); *Damino v. Board of Regents*, 508 N.Y.S.2d 618 (N.Y. App. Div. 1986) (denying the CCP to acts prior to marriage when New York only had a communications privilege); *State v. Pratt*, 53 N.W.2d 18 (Wis. 1967) (denying defendant's claim to the ATP as to acts prior to marriage, when Wisconsin only had a communications privilege).

¹¹³ The exception levies double punishment, because it not only denies a noncollusive marriage the protections of the ATP, but also labels the marriage a sham and thus voidable. See *supra* part II.C. (discussing the sham marriages exception).

¹¹⁴ 51 F.R.D. 315, 369 (1971).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 371.

¹¹⁷ 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974).

¹¹⁸ *Id.* at 1396. Under the joint participants exception to the ATP, joint participants in crime cannot avail themselves of that privilege. See *supra* note 83. According to *Van Drunen*, two rationales justify the exception: (1) it serves as a disincentive to criminals to

Federal Rule of Evidence 505(c)(2) prevents testimony as to matters prior to marriage.¹¹⁹ Although the court acknowledged that Rule 505(c)(2) was only a proposal, the court gave no further explanation for its reliance on a nonstatutory pronouncement, other than reciting the Advisory Committee's note. Oddly, the court did not discuss that, on the facts, the marriage did indeed appear fraudulent.¹²⁰ Rather than reach such a finding, the court took the easier, less burdensome route offered by the per se proposed Rule 505(c)(2).

Two years after *Van Drunen*, the United States District Court for the Eastern District of Tennessee, in *United States v. Owens*,¹²¹ refused to follow *Van Drunen*.¹²² The *Owens* court reasoned that *Van Drunen* had created the premarriage acts exception based on the faulty assumption that Proposed Rule 505 would become law. The *Owens* court stated: "The reason for the [ATP] is too pervasive for the creation of exceptions in such an 'off-handed manner.'" ¹²³ *Owens* also criticized Proposed Rule 505(c)(2) as an "abortive effort" to combine the ATP with the CCP.¹²⁴

Despite congressional rejection of Proposed Rule 505(c) and the *Owens* court's questioning of the reasoning in *Van Drunen*, the Seventh Circuit, in *United States v. Clark*,¹²⁵ continued to assert that its premarriage acts exception was a necessary modification to the ATP. Stating that the exception primarily addresses the problem of collusive marriages,¹²⁶ *Clark* explained that the exception does not

recruit their spouses as accomplices; and (2) in cases when spouses jointly participate in crime, one of the rationales for the privilege—its rehabilitative effect on marriage—is irrelevant. The first rationale makes little sense after *Trammel*, because criminals can no longer be certain that their spouses will not testify. The second rationale fails for two separate reasons: First, the rehabilitative effect of marriage has never been offered as a justification for the privilege. Second, the rationale erroneously implies that criminal marriages are unworthy of rehabilitation.

¹¹⁹ 501 F.2d at 1397.

¹²⁰ Defendant Van Drunen married his wife—the alien in question—one month after his indictment.

¹²¹ 424 F. Supp. 421 (E.D. Tenn. 1976). In the case, defendant's husband was called to testify that defendant, prior to becoming his wife, had cashed a forged check which he later paid back.

¹²² *Id.* at 422.

¹²³ *Id.* at 423.

¹²⁴ *Id.* at 422. Although the *Owens* court did not explain what it meant by this statement, apparently the court was referring to the fact that the ATP concerns acts and communications made prior to and during marriage, while the CCP concerns only communications made during marriage. By limiting the ATP to acts and communications during marriage only, the two privileges become less distinct.

¹²⁵ 712 F.2d 299 (7th Cir. 1983). Clark and his wife were convicted of embezzling money from a savings and loan where she worked before they married.

The Court asserted that the rejection of Proposed Federal Rule of Evidence 505(c)(2) "did not signal the rejection of the premarriage acts exception." *Id.* at 302.

¹²⁶ *Id.* at 302.

require an actual finding of collusion. The *Clark* court argued that the exception allows courts to avoid mini-trials on the sincerity of the parties in getting married and is consistent with the general policy of limiting privileges in light of reason and experience.¹²⁷ This explanation clearly established that the presumption of a collusive marriage is irrebuttable.

Clark's rationale for the premarriage acts exception—to deter the formation of collusive marriages entered into solely to suppress testimony¹²⁸—is fundamentally flawed. After *Trammel*, a criminal defendant can no longer demand suppression of a witness's testimony after marrying that witness, because only the witness-spouse can raise the privilege. Although the defendant-spouse may succeed in persuading the witness-spouse not to testify, after *Trammel* the defendant-spouse cannot legally compel that result. *Clark*, decided post-*Trammel*, ignored this logical inconsistency.

The *Clark* court's flawed reasoning allowed it to create an exception to the ATP that conflicts with the ATP in several ways. At the most basic level, *Clark's* formulation of the premarriage acts exception flatly contradicts the rationale supporting the ATP—protecting the marriage at the time of trial regardless of the testimony's subject matter.¹²⁹ Further, by presuming collusion in marriages formed after testimonial acts, the exception violates the general rule that, following proof from the proponent that a legal marriage exists, the challenger to an assertion of the ATP must provide proof that the marriage is collusive.¹³⁰ Under the premarriage acts exception, the challenger meets the burden of proof through an irrebuttable presumption. As a result, many noncollusive marriages could be labelled collusive without an opportunity to rebut that presumption. The Supreme Court, in *Vlandis v. Kline*,¹³¹ held that the law

¹²⁷ *Id.* *Clark's* appeal to promote judicial administrability and avoid "mini-trials" through application of the privilege does not offer a convincing rationale for the exception. Sham marriages are not common enough to make the occasional mini-trial a great burden. The burden is no greater than that involved in proving the existence of a conspiracy in order to apply the co-conspirator hearsay exception, which requires an evidentiary hearing.

To be consistent with domestic relations law, the hearing itself should follow domestic relations rules for proving fraudulent marriages to the extent possible.

¹²⁸ As support for its argument, *Clark* asserts that no court has ever rejected the exception, apparently overlooking *Owens*. *Id.* More importantly, *Clark* fails to mention that, except for the Seventh Circuit and the Eastern District of Tennessee, no court had ever entertained the notion.

¹²⁹ See *Medine*, *supra* note 32, at 530 ("[The exception is] inconsistent with protecting the ongoing marital relationship . . .").

¹³⁰ See *supra* part II.C. (discussing the sham-marriage exception).

¹³¹ 412 U.S. 441, 452 (1973) (invalidating a Connecticut statute that irrebuttably presumed nonresidency for those applying from out of state for in-state college tuition); see also *Crawford v. Cushman*, 531 F.2d 1114, 1124-26 (2d Cir. 1976) (invalidating a

disfavors irrebuttable presumptions that are not universally true in fact, because they deny due process to those who could disprove the presumption.¹³² Under the reasoning of *Vlandis*, the premarriage acts exception violates due process because it is not universally true in fact and denies those falling within its reach the opportunity to prove that their marriage is not a sham.

Two recent federal cases, one in the Eastern District of Michigan¹³³ and one in the Ninth Circuit,¹³⁴ show the potential unfairness of the premarriage acts exception. Both cases concern nonsham marriages that would have been denied the ATP had those jurisdictions recognized the premarriage acts exception.¹³⁵ In each case, the exception would have denied the ATP to legal, noncollusive, viable marriages and thus would have disrupted marital harmony, directly contradicting the privilege's purpose.

The first opportunity to examine *Clark* and extend the premarriage acts exception beyond the Seventh Circuit came in *In re Grand Jury Proceedings*.¹³⁶ In *In re Grand Jury Proceedings*, the timing of the witness's marriage to the defendant was highly suspicious on its face, because the couple married eight days after the witness's first grand jury testimony and four days before her scheduled second grand jury testimony. However, the court rejected *Clark's* premarriage acts exception and refused to find that the marriage was a sham.¹³⁷ Citing *Trammel* as support for the continued vitality of the ATP, the court held that when no proof of a sham marriage can be offered, the premarriage acts exception would render the privilege meaningless and cannot be squared with the policy behind the privi-

federal statute that irrebuttably presumed pregnant member of the U.S. Marine Corps unfit for duty).

¹³² Unlike the premarriage acts exception, the marital privileges are not per se rules. Although they seem to presume that testimony will either destroy the marriage (for the ATP) or that the spouses will be deterred from communicating (for the CCP), these are presumptions central to a determination of policy; they are not presumptions designed to adjudicate a disputed set of facts.

¹³³ *In re Grand Jury Proceedings*, 640 F.Supp 988 (E.D. Mich. 1986). See discussion *infra* note 136 and accompanying text.

¹³⁴ *In re Grand Jury Proceedings* (Emo), 777 F.2d 508 (9th Cir. 1985) (consolidated cases). Emo received a grand jury subpoena to testify regarding Schultz, his live-in companion of two years. They married one month later, just five days before his grand jury appearance. The prosecution claimed the marriage was a sham, even though the government conceded that the couple married as a natural progression of their love and affection for each other and that they intended to live together as husband and wife.

¹³⁵ *In re Grand Jury Proceedings*, 640 F. Supp. 988, explicitly rejected the exception pointing out that its application would have led to an erroneous finding of fraud. *Id.* at 991-92. *In re Grand Jury Proceedings* (Emo), 777 F.2d 508, did not discuss the exception nor adopt it.

¹³⁶ 640 F.Supp. 988 (E.D. Mich. 1986).

¹³⁷ *Id.* at 992.

lege.¹³⁸ Echoing the *Owens* opinion, the court also declared that it could find no basis for such a broad-based exception.¹³⁹

On the federal level, no circuit other than the Seventh Circuit has adopted the premarriage acts exception. However, on the state level, where statute largely determines the rules of testimonial privilege, the premarriage acts exception has enjoyed greater success. Eight states currently have some type of premarriage acts exception,¹⁴⁰ with a ninth state awaiting adoption of the exception by its supreme court.¹⁴¹ Almost all of these statutes were enacted after the Seventh Circuit's decision in *Clark*. Relatively few cases have applied these statutes, but two cases in particular suggest state courts will view such statutes approvingly. In *Osborne v. State*,¹⁴² a case involving testimony relating to acts prior to marriage, the Alaska Supreme Court denied the ATP based on its finding of a sham marriage. However, the court did not base its finding of a sham marriage on actual proof of fraud, but instead relied on the inference of fraud from the circumstances of an "eve-of-trial" wedding.¹⁴³ Rather, the court stated that, had the state's premarriage acts exception been in force at the time of the events in question, it would

¹³⁸ *Id.* In rejecting the government's alternate claim that the marriage was in fact a sham, the court noted that the couple had made their marriage plans two years earlier and had chosen the actual wedding date solely because it was the only day the local magistrate could perform the ceremony. The court added that there was no evidence indicating that the couple did not plan to cohabit after marriage. *Id.* at 990-91.

In one commentator's view, however, the facts of the case indicate that the privilege was unnecessary for the couple, since marital harmony was obviously not sufficiently disturbed to prevent the marriage from taking place eight days later. See *Medine*, *supra* note 32, at 558. One has to wonder how Professor Medine knows whether marital harmony was disturbed or not. His comment parallels the approach this Note argues *against*, i.e., determining whether a marriage deserves the privilege based on presumptions about the state of the marriage when few facts support the presumption.

¹³⁹ 640 F. Supp. at 992.

¹⁴⁰ See ALASKA R. EVID. 505(a)(2)(D)(iv) (1991) (covering crimes prior to marriage); ARIZ. REV. STAT. ANN. § 13-4062(1) (1989) (creating exception by exclusion, by granting the ATP only to events during marriage); CAL. EVID. CODE § 972(f) (West 1966 and 1990 Supp.) (only applies where witness-spouse acquired knowledge of the act before marriage and was aware that defendant-spouse had been arrested or charged with a crime); COLO. REV. STAT. § 13-90-107(1)(a)(I) (1987) (covers only crimes prior to marriage); HAW. REV. STAT. § 626-1, Rule 505(c)(2) (1988) (adopting modified version of Proposed Federal Rule of Evidence 505); MINN. STAT. ANN. § 595.02(1)(a) (West 1988) (covers only homicide or attempted homicide prosecutions when the crime occurred prior to marriage); NEV. REV. STAT. ANN. § 49.295(3) (Michie 1986); OR. REV. STAT. § 40.255(4)(b) (1988).

¹⁴¹ KY. REV. STAT. ANN. § 422A.0504 (Baldwin 1990) (effective July 1, 1992) (applicable to criminal proceedings).

¹⁴² 623 P.2d 784 (Alaska 1981).

¹⁴³ *Id.* at 787. The couple was married in the courthouse fifteen minutes prior to a hearing, at the urging of defendant's lawyer.

have applied that exception, making a finding of fraud unnecessary.¹⁴⁴

In *State v. Williams*,¹⁴⁵ the Arizona Supreme Court addressed whether the trial court below erred in admitting statements made by the defendant-spouse to the witness-spouse prior to their marriage. Because Arizona's ATP statute had no premarriage acts exception at the time, the court concluded that it had no choice but to hold that the trial court improperly denied the privilege.¹⁴⁶ Although the court was unable to say positively that the marriage was a sham, the court indicated that the spouses likely entered into the marriage to suppress testimony. The *Williams* court, reasoning similarly to the *Clark* court, criticized Arizona's marital privilege statute as encouraging marriages entered into to suppress testimony.¹⁴⁷ Two years later, the Arizona state legislature accepted the court's invitation to change the statute by adding a premarriage acts exception.¹⁴⁸ Hence, the state courts and legislatures, unlike federal courts, seem more receptive to the premarriage acts exception.

CONCLUSION

Although the marital privileges evolved from legal fictions, their inauspicious beginnings should not detract from, nor be relevant to, their present justifications. As long as the privileges have legal validity, courts and legislatures implementing the privileges should respect them.

Given the existence of the marital privileges in federal courts and in most states, courts and legislatures should apply the privileges in a manner consistent with their purposes and with state domestic relations law. The privileges undeniably address the interests of the marital unit. Courts and legislatures must therefore ensure that the privileges apply only to those persons legally married under state domestic relations law, which, under *Pennyroyer*, determines the definition of marriage.¹⁴⁹

¹⁴⁴ *Id.*

¹⁴⁵ 650 P.2d 1202 (Ariz. 1982).

¹⁴⁶ *Id.* at 1213.

¹⁴⁷ *Id.* at 1214. The *Williams* dissent took a more rigorous stance in favor of a premarriage acts exception. Desiring a reduction in administrative burdens, Judge Cameron argued that when testimony concerns illegal acts prior to marriage, the courts should not have to define the motives behind the marriage. In contrast to the majority, Judge Cameron believed that the courts need not wait for the legislature to create a premarriage acts exception, basing his belief on a legislative intent to have a premarriage acts exception implied into the ATP statute. *Id.* at 1216 (Cameron, J., dissenting). He cited no legislative history for his argument.

¹⁴⁸ ARIZ. REV. STAT. ANN. § 13-4062(1) (1989).

¹⁴⁹ See *supra* note 7 and accompanying text.

Thus divorced persons, deceased persons, engaged persons, persons not meeting the requirements of common-law marriage, putative spouses, unmarried cohabitants, and persons who married fraudulently should not benefit from the marital privileges, because such persons do not meet the requirements of legal marriage under state domestic relations law. But when the legal existence of a marriage is established under state domestic relations laws, courts and legislatures should not deny the marital privileges based upon a determination that the marriage is unworthy of the privileges' protections.

Respecting privileges does not require faith in the policies behind the privileges. Rather, respecting the privileges means applying them as defined and respecting state domestic relations law. The *Trammel* doctrine, the viability doctrine, and the premarriage acts exception show disrespect for both the purposes of the privileges and for state prerogatives in domestic relations law. The result is uninformed decision-making and contradictory definitions of marriage.

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