Partners in Crime: The Joint Participants Exception to the Privilege Against Adverse Spousal Testimony

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EXCEPTION TO THE PRIVILEGE AGAINST
ADVERSE SPOUSAL TESTIMONY

INTRODUCTION

The privilege against adverse spousal testimony is the privilege of a witness in federal proceedings to refuse to testify against his or her spouse. The rationale behind the privilege is that the harmony and

1. This Note will address only federal privilege law, which is governed by the federal courts. See Fed. R. Evid. 501; see also McCormick On Evidence § 76.1, at 182-83 (E. Cleary 3d ed. 1984) (discussing application of Rule 501 by federal courts) [hereinafter cited as McCormick On Evidence]; 2 C. Wright, Federal Practice and Procedure §§ 401, 402, at 407-12 (2d ed. 1982) (discussing the predecessor to Rule 501—Rule 26 of the Federal Rules of Criminal Procedure (1946-1975)). For an example of the regulation of federal privilege law by federal courts, see infra notes 15-32 and accompanying text.

2. The privilege applies at federal grand jury proceedings as well as at trial. In re Malfitano, 633 F.2d 276, 277 (3d Cir. 1980); In re Snoonian, 502 F.2d 110, 112 (1st Cir. 1974); In re Agosto, 553 F. Supp. 1298, 1325 (D. Nev. 1983); see United States v. Calandra, 414 U.S. 338, 346 (1974); In re Koecher, No. 85-1033, slip op. at 2258-59, 2264 (2d Cir. Feb. 28, 1985); Fed. R. Evid. 1101(d)(2); Fed. R. Evid. 501; Indirect Implications, supra note 1, at 129.


The privilege not to reveal confidential marital communications is a distinct privilege. See Trammel, 445 U.S. at 45 n.5; In re Koecher, No. 85-1033, slip op. at 2264; United States v. Sims, No. 82-1523, slip op. at 3-4 (6th Cir. Feb. 28, 1985); Archer, 733 F.2d at 359; Ammar, 714 F.2d at 258; United States v. Lefkowitz, 618 F.2d 1313, 1317 (9th Cir.), cert. denied, 449 U.S. 824 (1980); United States v. Mendoza, 574 F.2d 1373, 1379 (5th Cir.), cert. denied, 439 U.S. 988 (1978); United States v. Lilley, 581 F.2d 182, 189 (8th Cir. 1978); United States v. Cameron, 556 F.2d 752, 755 (5th Cir. 1977); United States v. Bolzer, 556 F.2d 948, 951 (9th Cir. 1977); United States v. Lustig, 555 F.2d 737, 747 (9th Cir.), cert. denied, 434 U.S. 926 (1977) and 434 U.S. 1045 (1978); United States v. Termin, 267 F.2d 18, 19 (2d Cir.), cert. denied, 361 U.S. 822 (1959); McCormick On Evi-
sanctity of a marriage should be fostered as a matter of social policy and that therefore the government should not compel spouses to alienate one another through adverse testimony. Rooted in English common...
law, the privilege focuses on preserving the marital harmony existing at the time of the proceeding at which the witness is called to testify. A refusal to testify against a spouse presumably indicates that there is marital harmony to preserve. On the other hand, willingness to testify against a spouse evidences a lack of such harmony.

In 1983 the Seventh Circuit held that the privilege cannot be claimed by a witness who is alleged to have participated in the crime with which his or her spouse is charged and about which the witness is summoned to testify. Under these circumstances, the witness may be compelled to...
testify against his or her spouse. The Second and Third Circuits have rejected this exception to the privilege.

This Note examines the appropriateness of the joint participants exception to the privilege against adverse spousal testimony. Part I briefly traces the history of the privilege and demonstrates that the courts are free to create exceptions to the privilege when policy considerations so warrant. Part II analyzes the rationales upon which the joint participants exception is based and argues that in light of the purpose of the privilege and the recent Supreme Court modification of the privilege in Trammel v. United States, the exception is not justified. Part III demonstrates the undesirable practical effects of adoption of the exception and concludes that the courts should not recognize the joint participants exception to the privilege against adverse spousal testimony.

I. HISTORICAL DEVELOPMENT OF THE PRIVILEGE

The privilege against adverse spousal testimony evolved from an English common law rule that disqualified spouses from testifying for or against each other. The rule was based on public policy favoring the

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1396. Since that time, the privilege has been modified, see infra note 31 and accompanying text. It is the joint participants exception to the modified privilege that is examined in this Note.

10. See In re Koecher, No. 85-1033, slip op. at 2265 (2d Cir. Feb. 28, 1985); In re Malfitano, 633 F.2d 276, 277 (3d Cir. 1980); cf. United States v. Clark, 712 F.2d 299, 300 (7th Cir. 1983) (court affirmed contempt order issued by district court when spouse refused to testify after exception was applied).


14. See supra note 5 and accompanying text.


The rule of disqualification had developed by 1628, see 8 J. Wigmore, supra note 3, § 2227, at 212; Modification, supra note 3, at 1014 & n.9, however, prior to that time both favorable and adverse spousal testimony were apparently admissible. See Bent v. Allot, 21 Eng. Rep. 50, (Ch. 1579-80) (wife permitted to testify in behalf of her husband; husband permitted to exclude her adverse testimony on cross-examination by suppressing the favorable testimony given on direct examination).

There was an exception to the rule in criminal prosecutions in which one spouse was accused of committing an offense against the person of the other. See Trammel, 445 U.S. at 46 n.7; Hawkins, 358 U.S. at 75; Bowman, 38 U.S. (13 Pet.) at 221; United States v. Trammel, 583 F.2d 1166, 1168-69 (10th Cir. 1978), aff'd on other grounds, 445 U.S. 40 (1980); Criminal Procedure, supra note 3, at 127; Choice to Testify, supra note 3, at 963; Fourth Circuit, supra note 3, at 340. In such a case adverse spousal testimony was admissible. See Reutlinger, supra note 4 at 1363; Criminal Procedure, supra note 3, at 127.
fostering of family peace, repugnance to the conviction of an individual through the testimony of his or her spouse, and a desire to rid the courts of perjured testimony likely to be given by witnesses interested in the case.

Prior to the enactment of legislation governing the applicability of common law privileges in federal proceedings, United States federal courts assumed that all such privileges applied and, in the absence of legislation, could be modified as the courts saw fit. Under this assumption the Supreme Court abolished the portion of the rule excluding testimony by one spouse in favor of the other, reasoning that the rationale behind it—witness incompetency because of interest—was outdated and therefore no longer supported the rule's application. The remainder of the rule was treated as a privilege barring adverse testimony in the absence of the consent of both spouses. Subsequently, Congress provided


17. Wyatt v. United States, 362 U.S. 525, 535 (1960) (Warren, C.J., dissenting); United States v. Gonella, 103 F.2d 123, 123 (3d Cir. 1939); 8 J. Wigmore, supra note 3, § 2227, at 212; Choice to Testify, supra note 3, at 962; A New Rule, supra note 3, at 785-86; see Fourth Circuit, supra note 3, at 340.

18. Hawkins v. United States, 358 U.S. 74, 75 (1958); see Reutlinger, supra note 4, at 1363; Modification, supra note 3, at 1014; Fourth Circuit, supra note 3, at 339-40; Evidentiary Privilege, supra note 1, at 147; A New Rule, supra note 3, at 786 & n.14; 58 Den. L.J. 357, 358 (1981); see also Scott v. Lloyd, 37 U.S. (12 Pet.) 145, 149 (1838) (persons interested in a case will be tempted to perjure themselves).

Apparent, the portion of the rule excluding favorable testimony was based on witness incompetency because of interest, 69 Ill. B.J. 438, 438 (1981); see Hawkins v. United States, 358 U.S. 74, 76 (1958) (once the interest rationale was no longer deemed viable, the portion of the rule barring favorable spousal testimony was abolished); Haney, supra note 3, at 232-33 (same); Criminal Procedure, supra note 3, at 127-28 (same); Modification, supra note 3, at 1014-15 (same); Evidentiary Privilege, supra note 1, at 147-48 (same), while the portion excluding adverse testimony was based on the desires to foster marital harmony and avoid society's repugnance to convicting an individual through his or her spouse's testimony. See In re Koecher, No. 85-1033, slip op. at 2270 (2d Cir. Feb. 28, 1985); Reutlinger, supra note 4, at 1359-60, 1363.


20. See Wolfe v. United States, 291 U.S. 7, 12 (1934); Funk v. United States, 290 U.S. 371, 381-83 (1933). Courts reasoned that the application of privileges in federal proceedings was "governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience." Wolfe v. United States, 291 U.S. 7, 12 (1934) (citing Funk v. United States, 290 U.S. 371 (1933)).

21. Funk v. United States, 290 U.S. 371, 386 (1933). In fact, a defendant in a criminal case has a constitutional right to have his or her spouse testify in his or her favor. See Washington v. Texas, 388 U.S. 14, 18-19 (1967).


23. Trammel v. United States, 445 U.S. 40, 44 (1980); Hawkins v. United States, 358 U.S. 74, 78 (1958); see Modification, supra note 3, at 1015; Choice to Testify, supra note 3,
that common law privileges, as modified by the federal courts, would apply in all federal criminal proceedings and in federal civil proceedings whenever federal law supplied the rule of decision with respect to a particular claim or defense. 24

Courts have adopted numerous exceptions to the privilege against adverse spousal testimony. For example, the privilege does not apply when a spouse is charged with a crime against the person of the witness, 25 nor does it apply when the marriage is a "sham" 26 or has terminated through divorce. 27 In adopting these and other exceptions, 28 the courts reasoned


The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Fed. R. Crim. P. 26, 327 U.S. 827, 852 (1946). Thus, Rule 26 affirmatively granted federal courts conducting criminal proceedings the power they had previously assumed. See Fed. R. Crim. P. 26 advisory committee note, reprinted in 2 C. Wright, supra note 1, § 401, at 408 n.2 (2d ed. 1982).

When Rule 26 was amended in 1972 (effective July 1, 1975), the above quoted language was deleted because the Federal Rules of Evidence were to govern the privileges of witnesses. See Fed. R. Crim. P. 26 advisory committee note. Rule 501 of the Federal Rules of Evidence provides in pertinent part:

The privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law.


25. See Trammel v. United States, 445 U.S. 40, 46 n.7 (1980); Wyatt v. United States, 362 U.S. 525, 526 (1960); id. at 532 (Warren, C.J., dissenting); Hawkins v. United States, 358 U.S. 74, 75 (1958); Stein v. Bowman, 38 U.S. (13 Pet.) 209, 221 (1839); United States v. Trammel, 583 F.2d 1166, 1169 (10th Cir. 1978), aff'd on other grounds, 445 U.S. 40 (1980); United States v. Smith, 533 F.2d 1077, 1079 (8th Cir. 1976) (per curiam); 8 J. Wigmore, supra note 3, § 2239, at 242-43. The scope of the exception was expanded because the Federal Rules of Evidence were to govern the privileges of witnesses. See Fed. R. Crim. P. 26 advisory committee note. Rule 501 of the Federal Rules of Evidence provides in pertinent part:

[T]he privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law.


27. Pereira v. United States, 347 U.S. 1, 6 (1954); United States v. Bolster, 556 F.2d 948, 951 (9th Cir. 1977); United States v. Lustig, 555 F.2d 737, 747 (9th Cir.), cert. denied, 434 U.S. 926 (1977) and 434 U.S. 1045 (1978); United States v. Crockett, 534 F.2d 589, 604 n.17 (5th Cir. 1976); United States v. Smith, 533 F.2d 1077, 1079 (8th Cir. 1976) (per curiam); United States v. Fisher, 518 F.2d 836, 838 (2d Cir.), cert. denied, 423 U.S. 1033 (1975); United States v. Termini, 267 F.2d 18, 19-20 (2d Cir.), cert. denied, 361
that under the circumstances, the purpose of the privilege—fostering marital harmony—would not be served by its application.\textsuperscript{29} In addition, the Supreme Court, in 1980, using similar reasoning,\textsuperscript{30} modified the privilege by vesting the right to claim it solely in the witness.\textsuperscript{31} When a witness, rather than claiming the privilege, chooses to testify against his or her spouse, presumably there is no marital harmony to foster.\textsuperscript{32} Thus, applying the privilege would serve no purpose.\textsuperscript{33}

It is well settled, therefore, that federal courts have power to define the scope of the privilege against adverse spousal testimony and to create exceptions to its application in federal proceedings when, under the cir-

\textsuperscript{29} See Wyatt v. United States, 362 U.S. 525, 527 (1960) (crime against witness-spouse); Lutwak v. United States, 344 U.S. 604, 615 (1953) ("sham" marriage); United States v. Trammel, 533 F.2d 1166, 1169 (10th Cir. 1976) (crime against witness-spouse),\textsuperscript{30} aff'd on other grounds, 445 U.S. 40 (1980); Ryan v. Commissioner, 568 F.2d 531, 543 (7th Cir. 1977),\textsuperscript{31} cert. denied, 439 U.S. 820 (1978). The privilege also does not apply when adverse spousal statements are admitted through the testimony of third persons, see United States v. Archer, 733 F.2d 354, 359 (5th Cir.),\textsuperscript{32} cert. denied, 105 S. Ct. 196 and 105 S. Ct. 198 (1984); United States v. Tsinnijinnie, 601 F.2d 1035, 1039 (9th Cir. 1979),\textsuperscript{33} cert. denied, 445 U.S. 966 (1980); United States v. Mackiewicz, 401 F.2d 219, 225 (2d Cir.),\textsuperscript{34} cert. denied, 393 U.S. 923 (1968), or through tape recordings when spouses were joint participants in a conspiracy, see United States v. Price, 577 F.2d 1356, 1364-65 (9th Cir. 1978),\textsuperscript{35} cert. denied, 439 U.S. 1068 (1979).


\textsuperscript{31} See id. at 53.

\textsuperscript{32} See supra note 8.

cumstances, the underlying purpose of the privilege will not be served by its application.

II. POLICY CONSIDERATIONS

There are three proposed justifications for the joint participants exception to the privilege against adverse spousal testimony: married persons' confidentiality in their marital communications, protection of the joint participants who may receive notoriety from testifying, and assuring a criminal that he or she can enlist the aid of his or her spouse in a criminal venture without fear of creating another potential adverse witness. See United States v. Clark, 712 F.2d 299, 301 (7th Cir. 1983); United States v. Trammel, 583 F.2d 1166, 1169-70 (10th Cir. 1978) (quoting United States v. Van Drunen, 501 F.2d 1393, 1396 (7th Cir.), cert. denied, 419 U.S. 1091 (1974)); United States v. Van Drunen, 501 F.2d 1393, 1396 (7th Cir.), cert. denied, 419 U.S. 1091 (1974). This rationale is similar to Jeremy Bentham's criticism of the privilege:

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

J. Bentham, Rationale of Judicial Evidence, 340 (1827). Because the modification of the privilege in Trammel eliminated any right of the defendant to exclude his or her spouse's adverse testimony, see Trammel v. United States, 445 U.S. 40, 53 (1980), neither Bentham's general criticism of the privilege nor the similar justification for the joint participants exception is viable. See In re Koecher, No. 85-1033, slip op. at 2266-67 (2d Cir. Feb. 28, 1985) (justification for exception no longer viable); cf. Trammel v. United States, 445 U.S. 40, 51-52 (1980) (in deciding to deprive defendant-spouse of privilege, Court considered Bentham's criticism). After Trammel, reliance on such arguments either to criticize the privilege or to justify exceptions to it is misplaced.

A joint participants exception to the privilege not to reveal confidential marital communications has been adopted by five circuits. See United States v. Sims, No. 82-1523, slip op. at 8 (6th Cir. Feb. 28, 1985); United States v. Broome, 732 F.2d 363, 365 (4th Cir.), cert. denied, 105 S. Ct. 181 (1984); United States v. Ammar, 714 F.2d 238, 258 (3d Cir.), cert. denied, 104 S. Ct. 344 (1983); United States v. Mendoza, 574 F.2d 1373, 1381 (5th Cir.), cert. denied, 439 U.S. 988 (1978); United States v. Kahn, 471 F.2d 191, 194-95 (7th Cir. 1972), cert. denied, 411 U.S. 986 (1973) (on marital privilege issue), rev'd on other grounds, 415 U.S. 143 (1974). The two marital privileges are, however, distinct, see supra note 3, and should be considered separately in determining whether a particular exception should be adopted. See In re Koecher, No. 85-1033, slip op. at 2268-69 (2d Cir. Feb. 28, 1985); United States v. Archer, 733 F.2d 354, 359 (5th Cir.), cert. denied, 105 S. Ct. 196 and 105 S. Ct. 198 (1984); United States v. Ammar, 714 F.2d 238, 258 (3d Cir.), cert. denied, 104 S. Ct. 344 (1983); see also Pereira v. United States, 347 U.S. 1, 6 (1954) (privilege against adverse spousal testimony, unlike marital communications privilege, does not apply after divorce); United States v. Lilley, 581 F.2d 182, 189 (8th Cir. 1978) (same); United States v. Bolzer, 556 F.2d 948, 951 (9th Cir. 1977) (same); United States v. Lustig, 555 F.2d 737, 747 (9th Cir.) (same), cert. denied, 434 U.S. 926 (1977) and 434 U.S. 1045 (1978); United States v. Crockett, 534 F.2d 589, 604 & n.17 (5th Cir. 1976) (same); United States v. Termini, 267 F.2d 18, 19-20 (2d Cir.) (same), cert. denied, 361 U.S. 822 (1959); 8 J. Wigmore, supra note 3, § 2341(2), at 674.

The purpose of the confidential communications privilege is to encourage open and frank marital communication and engender interspousal trust, thereby promoting marital harmony. See United States v. Van Drunen, 501 F.2d 1393, 1396 (7th Cir.), cert. denied, 419 U.S. 1091 (1974); McCormick On Evidence, supra note 1, § 86, at 201; 8 J. Wigmore, supra note 3, § 2341, at 673; Reutlinger, supra note 4, at 1358-59; Choice to Testify, supra note 3, at 962-63 n.10; Fourth Circuit, supra note 3, at 344; 11 Cum. L. Rev. 465, 472 (1980); 58 Den. L.J. 357, 359 (1981). The availability of the privilege "turns on circum-
sons who engage in joint criminal activity do not have a harmonious marriage and therefore the purpose of the privilege would not be served by its application in such a case; marriages between partners who engage in joint crimes do not deserve protection because of the diminished rehabilitative potential of such marriages; and the exception is consistent with the Supreme Court opinion in *Trammel v. United States*, which extensively criticized the privilege and sought to limit its scope.

A. Value of the Marriage to the Spouses

It is argued that spouses who commit joint crimes do not enjoy marital harmony and that application of the privilege in these cases does not serve the privilege's underlying purpose. Because there is no marital harmony to preserve, employing the privilege merely excludes relevant evidence.

Concededly, a testimonial privilege, which by definition excludes relevant evidence, should apply only when its application will further the privilege's underlying purpose. The privilege against adverse spousal testimonies surrounding the communication when it was made." United States v. Archer, 733 F.2d 354, 359 (5th Cir.), *cert. denied*, 105 S. Ct. 196 and 105 S. Ct. 198 (1984); see Blau v. United States, 340 U.S. 332, 333-34 (1951); Wölfe v. United States, 291 U.S. 7, 14 (1934); 8 J. Wigmore, *supra* note 3, §§ 2335-2336, at 647-56; 2 C. Wright, *supra* note 1, § 406, at 438. An exception to the privilege for marital communications made in furtherance of joint criminal activity is consonant with the purpose of the privilege, see United States v. Ammar, 714 F.2d 238, 258 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983); United States v. Mendoza, 574 F.2d 1373, 1380-81 (5th Cir.), *cert. denied*, 439 U.S. 988 (1978); United States v. Kahn, 471 F.2d 191, 194 (7th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973) (on marital privilege issue), *rev'd on other grounds*, 415 U.S. 143 (1974), because the joint commission of crime rather than marital harmony is promoted by protecting such communications.

In contrast, the purpose of the privilege against adverse spousal testimony is to preserve the marital harmony existing at the time a spouse is called to testify, by permitting the witness-spouse to refuse to testify adversely. See *supra* notes 4, 6-7 and accompanying text. An exception for marriages involving joint criminal activity will directly contravene the purpose of the privilege because unwilling spouses will be forced to testify adversely, thereby damaging or destroying the marital harmony that the privilege seeks to preserve. See *supra* notes 4, 6-7, 9-10 and accompanying text.


37. See *In re Koecher*, No. 85-1033, slip op. at 2267 (2d Cir. Feb. 28, 1985); United States v. Clark, 712 F.2d 299, 301 (7th Cir. 1983); *In re Malfitano*, 633 F.2d 276, 278 (3d Cir. 1980); United States v. Van Drunen, 501 F.2d 1393, 1397 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974).


39. See United States v. Clark, 712 F.2d 299, 301 (7th Cir. 1983).

40. See *supra* note 36.


testimony seeks to preserve marital harmony and accordingly should apply only when there is marital harmony to preserve. There is no evidence, however, that married persons who participate in joint criminal ventures do not enjoy marital harmony. Such an assumption, therefore, does not support the adoption of a general rule compelling joint participant spouses to testify against one another. 

A case-by-case inquiry into the nature of the marriage is equally inappropriate. Because there are no objective standards by which a judge can determine whether marital harmony exists, the decision would depend solely on the particular judge's subjective view of what constitutes marital harmony. That this is not a proper area of judicial inquiry seems to have been recognized by the Supreme Court in Trammel. By vesting the privilege in the witness—the only person in the proper position to determine whether there is marital harmony—the Court obviated the need for judicial inquiry into the nature of the marriage. Because a witness will willingly testify against his or her spouse when there is no marital harmony, the privilege will not be extended to marriages that in fact need no protection. Thus, there is no need for the joint partici-

44. See supra notes 4, 6.
45. See Trammel v. United States, 445 U.S. 40, 52 (1980); In re Malfitano, 633 F.2d 276, 277-78 (3d Cir. 1980); cf. Pereira v. United States, 347 U.S. 1, 6 (1954) (privilege inapplicable after divorce); Lutwak v. United States, 344 U.S. 604, 614 (1953) (privilege inapplicable when spouses entered into marriage without any intention of living together as husband and wife); Stein v. Bowman, 38 U.S. (13 Pet.) 209, 221 (1839) (privilege inapplicable when one spouse is charged with a crime against the other); United States v. Cameron, 556 F.2d 752, 756 (5th Cir. 1977) (privilege inapplicable when the marriage has in fact, although not legally, terminated); United States v. Apodaca, 522 F.2d 568, 571 (10th Cir. 1975) (privilege inapplicable when marriage was entered into for sole purpose of obtaining the benefits of the privilege).
46. In re Malfitano, 633 F.2d 276, 278 (3d Cir. 1980); see In re Koecher, No. 85-1033, slip op. at 2267 (2d Cir. Feb. 28, 1985); United States v. Trammel, 583 F.2d 1166, 1173 (10th Cir. 1979) (McKay, J., dissenting), aff'd on other grounds, 445 U.S. 40 (1980); see also Choice to Testify, supra note 3, at 969 ("[p]artners in crime may indeed have a very stable marital relationship"). It is noteworthy that in In re Koecher, the alleged joint participant spouse claimed that she and her husband in fact enjoyed marital harmony, see In re Koecher, No. 85-1033, slip op. at 2259 (2d Cir. Feb. 28, 1985), and that "she would rather die in prison than give any testimony detrimental to her husband," id. at 2263.
47. See In re Koecher, No. 85-1033, slip op. at 2267 (2d Cir. Feb. 28, 1985); In re Malfitano, 633 F.2d 276, 278 (3d Cir. 1980).
48. 69 Ill. B.J. 438, 441 (1981); see In re Malfitano, 633 F.2d 276, 279 (3d Cir. 1980).
49. 69 Ill. B.J. 438, 441 (1981).
53. See supra note 8.
54. See In re Malfitano, 633 F.2d 276, 278 (3d Cir. 1980); 58 Den. L.J. 357, 366-67 (1981); 69 Ill. B.J. 438, 440 (1981); see also Trammel v. United States, 445 U.S. 40, 52-
B. Value of the Marriage to Society

Proponents of the joint participants exception contend that a marriage of partners who engage in crimes together is not worth preserving.\textsuperscript{55} It is suggested that because of its diminished rehabilitative potential, such a marriage has no value to society and therefore its preservation is not in the public interest.\textsuperscript{56}

Proponents of this argument ignore the fact that society has not sought through substantive law, to penalize a marriage because the spouses jointly participated in a crime.\textsuperscript{57} Neither penal nor domestic relations law provides that a marriage must be dissolved because the couple committed a crime together.\textsuperscript{58} The absence of such legislation counsels against adopting the exception which, in effect, imposes a supplementary penalty for conspiracy when engaged in by spouses.\textsuperscript{59} In addition to imposing a sentence under the penal law, the government forces an unwilling witness to testify against his or her spouse thereby damaging and possibly destroying the marriage.\textsuperscript{60} In the absence of a substantive rule of law attaching such a penalty to the commission of joint crimes by spouses, it is inappropriate to produce this result through the use of an evidentiary rule.\textsuperscript{61}

Moreover, it does not necessarily follow from joint participation in a crime that the marriage has no rehabilitative potential.\textsuperscript{62} The marriage may help the couple to reintegrate with society, and it may restrain the spouses from engaging in future criminal conduct.\textsuperscript{63} Although it is not certain that the marriage will have these effects, the possibility should not be disregarded.\textsuperscript{64} A blanket rule is therefore unjustified. Furthermore, a case-by-case determination of the rehabilitative potential of the marriage seems impracticable in view of the fact that psychologists and sociologists who have studied criminal rehabilitation for years have not yet suc-

\textsuperscript{53} (1980) (Court's decision to vest privilege solely in witness-spouse motivated by desire not to extend protection to marriages that in fact need none).

\textsuperscript{55} See \textit{supra} note 37.

\textsuperscript{56} See United States v. Clark, 712 F.2d 299, 301 (7th Cir. 1983); \textit{In re} Malfitano, 633 F.2d 276, 278 (3d Cir. 1980); United States v. Van Drunen, 501 F.2d 1393, 1397 (7th Cir.), \textit{cert. denied}, 419 U.S. 1091 (1974). It should be noted that because the rehabilitative potential of a marriage has not previously been considered a justification for the privilege, see \textit{In re} Koecher, No. 85-1033, slip op. at 2267 (2d Cir. Feb. 28, 1985), the absence of such a potential is a dubious justification for an exception to the privilege. \textit{See id.}

\textsuperscript{57} \textit{In re} Malfitano, 633 F.2d 276, 278 (3d Cir. 1980).

\textsuperscript{58} \textit{See id.}

\textsuperscript{59} \textit{See id.}

\textsuperscript{60} See \textit{supra} notes 7, 10, 46 and accompanying text.

\textsuperscript{61} \textit{In re} Malfitano, 633 F.2d 276, 278 (3d Cir. 1980).

\textsuperscript{62} See \textit{In re} Koecher, No. 85-1033, slip op. at 2267 (2d Cir. Feb. 28, 1985); \textit{In re} Malfitano, 633 F.2d 276, 278-79 (3d Cir. 1980).

\textsuperscript{63} \textit{In re} Malfitano, 633 F.2d 276, 278 (3d Cir. 1980).

\textsuperscript{64} \textit{See id.} at 278-79.
cessfully determined what rehabilitates criminals. Accordingly, the joint participants exception should not be recognized on the theory that the marriage is not worth preserving.

C. The Implications of Trammel

It is argued that recognition of the joint participants exception is consistent with the policy, adopted in Trammel, of narrowly construing the privilege against adverse spousal testimony. On the contrary, the Supreme Court, in that case, implicitly rejected the exception. The witness and the defendant spouse were alleged to have been joint participants in a criminal conspiracy. Because at that time the privilege could have been claimed by either the witness or the defendant, the testimony would have been excluded unless both spouses consented. The witness agreed to testify against her husband under a grant of use immunity.

65. See, e.g., H. Trester, Supervision of the Offender 188-89, 194-96 (1981) (arguing that criminals are effectively rehabilitated by supervision in the forms of probation and parole, rather than by imprisonment); Bergman, Some Criticism of Community Treatment Projects and Other Alternatives Examined, in A World Without Prisons 215, 215-34 (C. Dodge ed. 1979) (arguing that community treatment programs are more successful in rehabilitating criminals than is imprisonment); Dagger, Restitution, Punishment, and Debts to Society, in Victims, Offenders, and Alternative Sanctions 3, 7-12 (1980) (arguing that requiring a criminal to make restitution to the victim—either directly or through community service—will effectively reform him); Martinson, What Works?—Questions and Answers About Prison Reform, 35 Pub. Interest 22, 22-50 (1974) (concluding from a study of the success of the various methods of rehabilitation that none of them effectively rehabilitates criminals).

66. See In re Koecher, No. 85-1033, slip op. at 2267 (2d Cir. Feb. 28, 1985); In re Malfitano, 633 F.2d 276, 278-80 (3d Cir. 1980).

67. See supra note 39 and accompanying text.

68. See Criminal Procedure, supra note 3, at 130; see also In re Koecher, No. 85-1033, slip op. at 2266 (2d Cir. Feb. 28, 1985) ("[T]he Supreme Court's action in Trammel has some negative implications as regards the joint participant exception. If the Supreme Court looked on the exception with favor . . . one would have expected the Court at least to have indicated that the exception might still make the privilege unavailable even when the witness-spouse asserted it."); Brief for Respondents at 8, 25-29, Trammel v. United States, 445 U.S. 40 (1980) (prosecution argued that the privilege does not apply when spouses are joint participants in crime); Brief for Petitioner at 9-17, Trammel v. United States, 445 U.S. 40 (1980) (petitioner argued against adoption of joint participants exception). In Trammel, the Court recognized that the Tenth Circuit's holding was based on joint participation, see United States v. Trammel, 583 F.2d 1166, 1169 (10th Cir. 1978), aff'd on other grounds, 445 U.S. 40 (1980), yet the Court affirmed that decision on other grounds without any mention of joint participation. See Trammel v. United States, 445 U.S. 40, 43, 53 (1980).

69. See Trammel, 445 U.S. at 42.

70. See id. at 44.

71. Mrs. Trammel was granted immunity pursuant to 18 U.S.C. §§ 6001-6005 (1982). See Trammel, 583 F.2d at 1168. Sections 6001-6005 provide that a witness in a federal proceeding who claims the privilege against self-incrimination can be compelled to testify notwithstanding the privilege. See 18 U.S.C. §§ 6001-6005 (1982). None of the information derived from the compelled testimony, however, can be used against the witness in a criminal proceeding other than a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order issued pursuant to §§ 6001-6005. See id.
because she had been promised lenient treatment by the government. The defendant, however, claimed the privilege to exclude the adverse testimony. The Tenth Circuit held that because there is no domestic harmony in a marriage involving joint criminal activity, the privilege was unavailable to the witness and her spouse.

The Supreme Court declined to adopt the Tenth Circuit's proposed exception to the privilege, deciding instead to modify the privilege by vesting the right to claim it exclusively in the witness. The Court criticized testimonial exclusionary rules in general and noted that they must be strictly construed because of their adverse effect on truthfinding. In addition, the Court discussed criticism of the privilege and considered suggestions that it be abolished altogether. Despite its obvious desire to limit the privilege to the greatest extent possible, the Court did not abolish the rule or adopt the proposed joint participants exception to it, which would render the privilege meaningless. The Court reasoned that its modification of the privilege properly balanced the competing public interests in marital harmony and unobstructed factfinding. Apparently the Court was not convinced that the joint participants exception urged by the prosecution would adequately protect the public interest in the preservation of marital harmony. The Court held that "the witness may be neither compelled to testify nor foreclosed from testifying." The Court, by implication, rejected the contention that a joint participant spouse can, consistently with the privilege, be compelled to testify against his or her spouse. It is thus apparent that the Court still

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73. Id. at 42.
74. See Trammel, 583 F.2d at 1170-71.
75. See Trammel, 445 U.S. at 43, 53.
76. See id. at 50.
77. See id.
78. See id. at 44-45.
79. See id. at 53.
80. See infra notes 86-93 and accompanying text.
81. See Trammel, 445 U.S. at 53.
83. It should be noted that under the facts of Trammel, it would have been easier for the Court to modify the privilege and adopt the proposed joint participants exception to it by holding that: a witness can voluntarily testify against his or her spouse; Mrs. Trammel's bargained-for testimony, see supra note 72 and accompanying text, was involuntary; and because she was a joint participant, Mrs. Trammel could be compelled to testify against her spouse. Thus, the Court could have avoided criticism of its decision. See Haney, supra note 3, at 274-75 (questioning voluntariness of adverse testimony given by joint participant spouses); Modification, supra note 3 at 1021-22 & n.73 (same); Choice to Testify, supra note 3, at 969 (same); Witness-Spouse, supra note 4, at 569 (same); 58 Den. L.J. 357, 368 (1981) (same).
84. Trammel, 445 U.S. at 53.
85. See In re Koecher, No. 85-1033, slip op. at 2266 (2d Cir. Feb. 28, 1985); see also In re Malfitano, 633 F.2d 276, 281 (3d Cir. 1980) (Gibbons, J., concurring) ("The Supreme Court [in Trammel] chose . . . to continue to rely on [the] belief that compelled testimony by one spouse against the other would have an adverse impact on their mar-
considers the privilege necessary to protect the sanctity of a marriage.

III. Effects of Adoption of the Exception

Given that the privilege was retained by the Supreme Court in *Trammel*, adoption of the joint participants exception is inappropriate because the exception will, in effect, abolish the privilege. Adoption of the exception may result in abuse by prosecutors, who apparently need only allege joint participation to force an unwilling witness to testify against his or her spouse.\(^\text{86}\) Any fifth amendment claims that would be available as to testimony that incriminates the witness as well as the spouse can be barred by a grant of use immunity.\(^\text{87}\) Because of the flexibility of the substantive law of conspiracy\(^\text{88}\) and the intimacy of marriages, it will be a

\[\text{86. See In re Malfitano, 633 F.2d 276, 278 n.3 (3d Cir. 1980) (district court had applied exception based on government affidavit stating that "the prosecution had received information from a cooperating witness indicating that the witness-spouse was a co-conspirator by reason of her knowledge of the object of the conspiracy and her facilitation of the attainment of the object of the conspiracy"); United States v. Trammel, 583 F.2d 1166, 1173 (10th Cir. 1978) (McKay, J., dissenting) ("Under present practice in this circuit, the mere allegation of conspiracy would permit the admission of the [spouse's] testimony before the truth of the conspiracy allegation is established.") (emphasis in original), aff'd on other grounds, 445 U.S. 40 (1980); In re Koecher, No. M11-188 (ELP) (S.D.N.Y. 1984) (available on LEXIS, Genfed library, Dist file) (exception was applied based on the prosecution's offer of proof of the alleged joint participation), rev'd, No. 85-1033, slip op. (2d Cir. Feb. 28, 1985); see also United States v. Clark, 712 F.2d 299, 300-02 (7th Cir. 1983) (although testifying spouse had been convicted of the crime for which his spouse was being tried, court did not rely on this fact to support its application of the exception); United States v. Van Drunen, 501 F.2d 1393, 1394, 1396-97 (7th Cir.) (opinion silent with regard to a standard of proof of witness's joint participation; however, defendant had been indicted for allegedly transporting witness, an alien, over state lines in violation of 8 U.S.C. § 1324(a) (1982)), cert. denied, 419 U.S. 1091 (1974).

87. See supra note 71.

88. 18 U.S.C. § 371 (1982) imposes criminal liability whenever "two or more persons conspire either to commit any offense against the United States or to defraud the United States . . . in any manner or for any purpose, and one or more of such persons [does] any act to effect the object of the conspiracy." *Id.* Although in order to convict an individual of conspiracy the prosecution must prove there was an agreement to carry out an unlawful purpose, see Nelson v. United States, 415 F.2d 483, 485 (5th Cir. 1969), *cert. denied*, 396 U.S. 1060 (1970); Cross v. United States, 392 F.2d 360, 362 (8th Cir. 1968); Jones v. United States, 251 F.2d 288, 293 (10th Cir.), *cert. denied*, 356 U.S. 919 (1958), the existence of the agreement may be inferred from circumstantial evidence, Iannelli v. United States, 420 U.S. 770, 777 n.10 (1975); United States v. Ryan, 478 F.2d 1008, 1015 (5th Cir. 1973); see Blumenthal v. United States, 332 U.S. 539, 556-57 (1947); United States v. Perry, 550 F.2d 524, 528-29 (9th Cir.), *cert. denied*, 434 U.S. 827 and 431 U.S. 918 (1977). As to the requirement that one of the agreeing persons must have committed an act in furtherance of the conspiracy, proof of a noncriminal and relatively insignificant act will suffice. *See, e.g.*, Yates v. United States, 354 U.S. 298, 333-34 (1957) (attendance at a lawful public meeting), *overruled on other grounds*, Burks v. United States, 437 U.S. 1 (1978); Castro v. United States, 296 F.2d 540, 542-43 (5th Cir. 1961) (driving to gun shop). The law has repeatedly been criticized as overbroad. *See, e.g.*, Krulewitch v. United States, 336 U.S. 440, 446-50 (1949) (Jackson, J., concurring); United States v. Bufalino, 285 F.2d 408, 418 (2d Cir. 1960); Johnson, The Unnecessary Crime of Conspiracy, 61 Calif. L. Rev. 1137, 1141-46 (1973); Marcus, Defending Conspiracy Cases: Mis-
rare occasion when the government is unable to charge a potential witness with joint participation.\footnote{See In re Malfitano, 633 F.2d 276, 279 (3d Cir. 1980); United States v. Trammel, 583 F.2d 1166, 1171, 1173 (10th Cir. 1978) (McKay, J., dissenting), aff'd on other grounds, 445 U.S. 40 (1980); Purdy, The Marital Privilege: A Prosecutor's Perspective, 18 Crim. L. Bull. 309, 322 (1982); see also Marital Privileges, supra note 8, at 196 ("little more than the natural inferences which arise from the marital relationship—close association with her husband and knowledge of his acts—may be sufficient to sustain a conviction [of conspiracy]").} Ironically, the more harmonious the marriage, the easier it is for the government to make such charges.\footnote{In re Koecher, No. 85-1033, slip op. at 2270 n.7 (2d Cir. Feb. 28, 1985) (quoting In re Malfitano, 633 F.2d 276, 279 (3d Cir. 1980)); In re Malfitano, 633 F.2d 276, 279 (3d Cir. 1980); see Marital Privileges, supra note 8, at 196.} The exception, in effect, threatens to obliterate the privilege retained by Trammel.

Even assuming that the prosecutor is required to present substantial proof of active criminal participation, the effect of adopting the exception is unjustifiable.\footnote{If the exception is adopted, it should apply only when the witness has previously been convicted (without compelled adverse spousal testimony) of the crime with which his or her spouse is charged. Such a rule would at least eliminate the potential for prosecutorial abuse discussed above, see supra notes 86-90 and accompanying text. Although this was the factual situation in United States v. Clark, the court in that case did not limit its holding to cases involving prior convictions. See 712 F.2d 299, 300-02 (7th Cir. 1983).} Under the exception, a witness who wishes to preserve marital harmony by refusing to testify against his or her spouse is compelled to testify and risk destroying that harmony.\footnote{See supra notes 7, 9-10 and accompanying text.} Not only is the goal of the privilege—fostering marital harmony\footnote{See supra notes 4, 6 and accompanying text.}—directly contravened, rendering the privilege meaningless, but in some cases the result may even be dissolution of the marriage. It is inappropriate to produce such a result through the use of an evidentiary rule.\footnote{In re Malfitano, 633 F.2d 276, 278 (3d Cir. 1980). See supra notes 57-61 and accompanying text.}

**CONCLUSION**

None of the arguments advanced to support the adoption of the joint participants exception to the privilege against adverse spousal testimony adequately justifies its adoption. Married persons who engage in joint criminal activity may very well enjoy marital harmony; that harmony is worth preserving because of the societal value it may have. Because the Supreme Court implicitly rejected the exception in Trammel, arguments that adoption of the exception is consistent with that opinion necessarily fail. Finally, the effects of adoption of the exception counsel against it. Adoption of the rule may well result in its abuse, and even when the rule is not abused, its effect is not only to contravene the very purpose of the
privilege, rendering it meaningless, but also to impose a supplementary penalty upon the spouses for the commission of the crime.

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