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THE TRAMMEL COURT’S HASTY REJECTION OF JERRY MAGUIRE’S VIEW OF MARRIAGE

Louis W. Hensler III

INTRODUCTION

In filmmaker Cameron Crowe’s Oscar-nominated film, Jerry Maguire, the title character, was a successful agent with a powerful sports agency, but he was fired after writing a mission statement challenging the way business was done in his field. As Jerry walked out of the agency for the last time, he asked for volunteers to go with him and start a new, visionary sports agency. He got only one taker—Dorothy Boyd, a young accountant. After walking out, Jerry and Dorothy rode down together on an elevator with a young, amorous couple, both of whom were deaf. As the four rode together in the elevator, the man signed something that elicited delighted gasps from his lover and from Dorothy. When the lovers left the elevator, Jerry wondered out loud what the man had said. Dorothy explained that her aunt was hearing impaired, and so she understood what the man had said—“you complete me.” Jerry seemed not to get it.

Not surprisingly, Jerry’s and Dorothy’s little enterprise went through some very trying times, which included their impulsive (some might say ill-considered) marriage. After times got very tough, they eventually separated. After more trials and tribulations, Jerry’s one and only client reached the pinnacle of NFL success. Immediately after his ultimate triumph, Jerry hopped on the first plane back to Dorothy. When he arrived at her house, she was gathered there with a group of divorced (and hostile) women. Thus the stage is set for the most memorable scene in the movie:

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* Associate Professor, Regent University School of Law; B.A., Bob Jones University, 1985; J.D. University of Chicago Law School, 1988. I wish to thank Kelli Hooke and Darcy Hall for their very helpful research and editorial assistance and both the American Center for Law and Justice and Regent University for their financial support. No living person has shaped my understanding of the essential nature of marriage more than Rachelen, who has contributed all of the best elements of our marital unity for more than twenty years.

325
Jerry: Hello? Hello. I’m lookin’ for my wife.

[Silence]

Jerry: Wait. Okay . . . okay . . . okay. If this is where it has to happen, then this is where it has to happen.

[Silence]

Jerry: I’m not letting you get rid of me. How about that?

[Silence]

Jerry: . . . But tonight, our little project, our company had a very big night—a very, very big night. But it wasn’t complete, wasn’t nearly close to being in the same vicinity as complete, because I couldn’t share it with you. I couldn’t hear your voice or laugh about it with you. I miss my—I miss my wife. . . . I love you. You—complete me. And I just had . . .

Dorothy: Shut up. Just shut up. You had me at “hello.”

Cameron Crowe, wittingly or not, betrays a certain understanding of marriage—that the husband and wife are separate parts of a whole, each “incomplete” without the other. This is “Jerry Maguire’s View of Marriage” referenced in the title of the essay. There is a reason that Jerry Maguire’s “I love my wife” speech has become so famous—it resonates. It expresses a view of marriage that many of us share, or at least one that we wish were true.¹

Popular as Jerry Maguire’s view of marriage may be, the Supreme Court of the United States has officially rejected it. The most significant contemporary American authority on spousal testimonial privilege is the Supreme Court’s 1980 decision in Trammel v. United

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¹. See discussion infra Part II.B.2.
The facts of *Trammel* brought the interest of petitioner Otis Trammel into potential conflict with that of his wife, Elizabeth Trammel. She was in a position of penal vulnerability because she had been caught in possession of heroin while leaving a plane in Hawaii. The government exploited Elizabeth Trammel’s vulnerability to secure her cooperation in the prosecution of Otis Trammel for importing heroin into the United States, a prosecution in which Elizabeth Trammel was named as an unindicted co-conspirator. Otis Trammel objected to his wife’s testimony against him on the ground of spousal testimonial privilege, but the trial court ruled that Elizabeth Trammel could testify in support of the government's case. This ruling was crucial to the government because the testimony of Elizabeth Trammel “constituted virtually [the] entire case” against Otis Trammel, who was convicted on the strength of his wife’s testimony.

The Supreme Court upheld the trial court’s admission of Elizabeth Trammel’s testimony against her husband. Acknowledging that the spousal testimonial privilege had “ancient roots,” the *Trammel* Court, in the crucial passage of Chief Justice Burger’s majority opinion, asserted:

> [The] spousal disqualification sprang from two canons of medieval jurisprudence: first, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; second, the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one.

Like any good advocacy piece, the Court’s opinion in *Trammel* employed a catchy theme—the defendant’s spousal testimonial privilege is a relic of the medieval oppression of women. "The

3. Id. at 42.
4. Id. at 43.
5. Id.
6. Id. at 44.
ancient foundations for so sweeping a privilege have long since disappeared. Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being.”

While the Court here, mostly for effect, characterized (or mischaracterized) the original rationale for the spousal disqualification, the precise rationale of the spousal disqualification was unimportant to the Court’s holding, since by this time the disqualification had evolved from a disqualification into a privilege. The rationale for the privilege was somewhat different from the rationale for the earlier disqualification.

The Trammel Court did address the evolved rationale for the privilege, as opposed to the disqualification, acknowledging that “[t]he modern justification for this privilege against adverse spousal testimony [was] its perceived role in fostering the harmony and sanctity of the marriage relationship.” The Court nevertheless, without apparent hesitation (or evidence), stated that “[w]hen one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve.”

The Court thus officially swept aside American courts’ long-standing reluctance to question the worth of individual marriages.

7. Id. at 52.
8. See infra notes 110-112 and accompanying text.
9. The distinction between disqualification and privilege is discussed infra notes 20-21 and in the accompanying text.
10. Trammel, 445 U.S. at 44.
11. Id. at 52.
12. See discussion infra notes 97-105 and accompanying text. The Court’s idea that the Trammel marriage must have been in trouble since Mrs. Trammel was willing to testify against Mr. Trammel appears to have been pure speculation. At a hearing on Trammel’s motion to exclude his wife’s testimony against him on the ground of privilege, Elizabeth Trammel testified to her reason for condemning her husband in court, and her stated reason had nothing to do with her marriage being “irretrievably broken;” rather, she testified that she was cooperating with the government because the government assured her “that she would be given lenient treatment.” The Government was true to its word—Elizabeth Trammel was not prosecuted for her admitted role in the heroin conspiracy. Trammel, 445 U.S. at 42-43.
In this essay, I contend that the Court’s rejection of Jerry Maguire’s view of marriage on the ground that it had long since disappeared was hasty and unsupported. The essay reviews the history of spousal testimonial privilege in Anglo-American law, beginning with the earliest extant authorities in the seventeenth century. The essay contends that the version of spousal unity that originally supplied the foundation for the spousal testimonial privilege, unlike the version of spousal unity rejected by the Court, is far from having “long-since disappeared.” 13 It is actually alive and well in America today.

I. HISTORY OF SPOUSAL TESTIMONIAL PRIVILEGE IN ANGLO-AMERICAN LAW

The Supreme Court’s opinion rejecting Otis Trammel’s claim of privilege begins with a brief account of the origin of the privilege and cites two authorities for the privilege’s “ancient roots:” a seventeenth-century authority, Lord Coke, and a twentieth-century authority, John H. Wigmore. 14 The Court agrees with both authorities that the roots of the spousal testimonial privilege run deep.

A. The “Tantalizing Obscurity” of the Privilege in the Sixteenth Century

It is frequently stated that the spousal testimonial privilege originated in the late sixteenth century, but this nearly universally accepted statement may not be precisely accurate. 15 It may be more precise to say that the earliest explicit recognitions of the privilege that can be found today are from the latter half of the sixteenth century. But it is not the case that records of one spouse’s testimony against another are common before this time. So while it is safe to say that the privilege existed by the latter half of the sixteenth

14. Id. at 43.
century, it is not possible to say with any certainty whether the privilege did or did not exist before then. It may be that the privilege has existed in some form for as long as the trial by oral testimony has existed—it is simply impossible to say. Therefore, Wigmore, the famous author of the equally famous evidence text bearing his name, cited by the *Trammel* majority, appropriately confessed that "[t]he history of the privilege not to testify against one's wife or husband is involved . . . in a tantalizing obscurity" and that "no certain record seems to have survived" of "the precise time of its origin, as well as the process of thought by which it was reached."¹⁶

Most scholars cite the late sixteenth-century case captioned *Bent v. Allot*¹⁷ as the earliest reference to spousal testimonial privilege.¹⁸ The opinion in *Bent v. Allot* clearly demonstrates that as of 1580, spouses could not freely testify against each other.¹⁹ But the precise nature of the limitations on the ability of spouses to testify against each other at this very early point in English legal history is not entirely clear. Was the limitation at that time in the nature of a disqualification, a privilege, or both?

The distinction between a "privilege" and a "disqualification" is important to a proper understanding of the history of the common law governing spousal testimony. A disqualification or incompetency is a refusal by the legal authority to accept the testimony of a particular witness altogether. At common law, various categories of witnesses were treated as incompetent to testify because their testimony was regarded as inherently unreliable. For example, a party was disqualified to testify in his own case because he had an interest in the outcome of the case. Because of this inherent self-interest, the party's testimony in his own case was thought to be too

¹⁶. 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2227 (McNaughton rev. 1961).
¹⁷. 8 Bent v. Allot, 21 Eng. Rep. 50 (Ch. 1580).
untrustworthy to be considered by the finder of fact. Likewise, the spouse of a party was also judged to be interested in the outcome of the case, and therefore equally incompetent to testify. The modern trend has been to abolish all such categories of incompetency so that today, witness shortcomings that formerly would have placed the witness within one of the old common law categories of incompetency now bear only on the credibility of the witness. Therefore, a party who formerly would have been disqualified from testifying because of the party's interest in the outcome of the case now may testify in his or her own case, but the opponent is free to point out the natural self-interest of the party and to suggest that the finder of fact should discount the credibility of the interested party's testimony accordingly.

A privilege, unlike the disqualification or incompetency, is not an absolute bar to testimony—it may be waived by the privilege holder. The significance of the distinction between a privilege and a disqualification is this: a privilege in this context is the right to decline to testify or to prevent another from testifying. The modern rule enabling the party spouse to prevent the witness spouse from testifying against the party spouse is a rule of privilege, not of disqualification. As will be discussed shortly, while the limitation on spousal testimony started as an absolute disqualification, it eventually evolved into a mere privilege.

Returning now to Bent v. Allot, the earliest known case discussing spousal privilege, the court in Bent was presented with the following scenario: "Colston, one of the defendants, examined his own wife as a witness." In response to the testimony of Colston’s spouse in his favor, the opponent sought to "take a subpoena against her on his behalf." The only question presented for resolution under these facts was a hypothetical one: What "if Colston will not suffer her to

20. See discussion infra notes 76-80 and accompanying text.
22. See discussion infra notes 110-112 and accompanying text.
24. Id.
be examined on the plaintiff’s party[?]"\textsuperscript{25} The answer provided was that if defendant would not agree to allow his wife to be examined by plaintiff, then neither could defendant Colston use her testimony, which would then be suppressed.\textsuperscript{26} The court apparently was not asked and did not opine whether the original examination of the wife was proper in the first place.

Based on the ruling in \textit{Bent}, Wigmore “assume[s]” (and other scholars assume along with him) that the privilege existed before the disqualification.\textsuperscript{27} Wigmore reads the decision in \textit{Bent} as treating the wife’s testimony on her husband’s behalf “as receivable, while his privilege to keep her from testifying against him is apparently sanctioned.”\textsuperscript{28} But Wigmore’s reading of the rather cryptic ruling in \textit{Bent} is very aggressive. While the decision in \textit{Bent} does appear to assume that a husband could successfully object to the testimony of his wife, Wigmore goes too far in reading this decision for the proposition that the wife’s original testimony on his behalf was proper. That testimony already given by the wife was presented in the \textit{Bent} decision as a \textit{fait accompli}, and is in no way approved. Neither did plaintiff apparently ask to have the wife’s original testimony suppressed. At most, the decision in \textit{Bent} holds that a wife’s testimony cannot be used for the husband’s side but withheld from the other side. The court does not address whether it was proper for the wife to testify at all. Thus, it appears that some form of privilege or disqualification existed as of 1580, but it is not entirely certain what the nature of the privilege or disqualification was at that time.

To buttress his aggressive reading of \textit{Bent v. Allot} for the proposition that the privilege antedated the disqualification, Wigmore notes that “the privilege is recognized more than once in the next half century” following \textit{Bent v. Allot}.\textsuperscript{29} Wigmore cites one example\textsuperscript{30}

\textsuperscript{25} \textit{Id.}
\textsuperscript{26} \textit{Id.} This holding appears to be similar to the roughly contemporary rule in the Court of Star Chamber that no party could object to “a winte[s] as incompetent, if he examine him a[ll]o him[s]elf.” \textsc{William Hudson}, A \textsc{Treatise of the Court of Star Chamber} 201 (Francis Hargrave ed., The Legal Classics Library 1986) (1635).
\textsuperscript{27} \textit{See Wigmore, supra note 16; see, e.g., Connor, supra note 22 at 273.}
\textsuperscript{28} \textit{See Wigmore, supra note 16.}
\textsuperscript{29} \textit{Id.}
recognizing the privilege in the fifty years following *Bent v. Allot*. In this anonymous case, the court was asked "whether the wife of a bankrupt can be examined by the commissioners,"\(^{31}\) to which the court responded that "she shall not be examined."\(^{32}\) Why Wigmore characterizes this rather cryptic holding as a recognition of the privilege rather than a recognition of the disqualification is a mystery,\(^{33}\) particularly when the holding is read in context. In holding that "by the common law [the wife] shall not be examined," the Court analogized to the circumstance of a husband’s treason, which the wife "is not bound . . . to discover . . . although the son [is] bound to reveal it."\(^{34}\) This analogy demonstrates that there was something distinctive about the wife’s relationship to the husband, as opposed to the son’s relationship to the father, that prevented her from testifying where the son could. This could be either a privilege or a disqualification, but some light may be cast by a brief sentence immediately following the words "she shall not be examined": "An infant shall not be examined."\(^{35}\) This sentence appears, clearly, to be a case of disqualification of a child from testifying. Infants were disqualified under one of the common law categories, along with interested parties, the insane, atheists, and others, because their testimony could not be trusted. The citation of the disqualification of a child, immediately after the statement that the wife could not be examined, suggests that the reason for the impermissibility of examining the wife at trial was not purely one of privilege. Rather, the wife appears to have been entirely disqualified as a witness. Therefore, Wigmore’s assertion that “there appears no ruling upon a wife’s disqualification during that whole period, nor for some time thereafter,”\(^{36}\) appears not to be supported by the authorities that he cites.\(^{37}\) The point here is that Wigmore was right in the first place—

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32. *Id.* at 657.
33. See Wigmore, *supra* note 16.
35. *Id.* at 657.
36. See Wigmore, *supra* note 16.
37. *Id.*
the origin and nature of the privilege or disqualification in English law is shrouded in mystery, notwithstanding Wigmore's speculation on the topic, discussed below.38

B. An Absolute Disqualification Takes Shape Under the Influence of Coke in the Seventeenth and Eighteenth Centuries

There may (or may not) have been a relatively brief period of uncertainty during the sixteenth century concerning whether, why, and to what extent one spouse might testify for or against another. But by the time Lord Coke published his Commentaries on Littleton in the early seventeenth century, it appears to have become abundantly clear that no mere "privilege" was needed because an established rule prohibited the husband and wife from testifying even in favor of the other spouse. Thus, by the time of Coke, the rule clearly was one of disqualification, not merely of privilege.39 Coke's treatment of the subject, cited by the Supreme Court as part of the ancient roots of the privilege, is mostly of historical interest since Otis Trammel's claim was one of privilege, and Coke's text on the subject was part of a larger treatment of testimonial disqualifications. The passage from Coke's commentary on Littleton, quoted by the Trammel Court, identifies several categories of witnesses disqualified from providing testimony: the "infamous,"40 the "[i]nfidell,"41 "those of non sane memorie,"42 and, most importantly for present purposes, "a partie interested, or the like."43

As noted above, based upon an aggressive reading of the cryptic holding in Bent v. Allot, Wigmore assumed that at this early stage there already was a distinction between the privilege and the disqualification, even though no medieval authority ever explicitly separated the two concepts.44 Wigmore himself noted that the

38. See discussion infra note 171 and accompanying text.
41. Id at 621.
42. Id.
43. Id.
44. See discussion supra notes 17-23 and accompanying text.
concepts of spousal disqualification and spousal privilege "travel together, associated in judicial phrasing, from almost the beginning of their recorded journey." 45 Yet Wigmore seemed to find it "odd" that the spousal testimonial privilege "comes into sight about the same time as the disqualification of husband and wife to testify on one another's behalf . . ."46 Wigmore saw "no necessary connection in principle" between the privilege to prevent a spouse from testifying and the disqualification of both from testifying in each other's causes.47 Earlier authorities betrayed no similar puzzlement over the connection between spousal privilege and spousal disqualification.

Coke, for example, asserted two reasons that spouses could not testify for or against each other. First, he stated as a matter of fact that "a wife cannot be produced either against or for her husband, quia sunt duae animae in carne una"48—spouses cannot testify for or against each other "because they are two souls in one flesh."49 While Coke presents this disqualification as though the connection between the unity of husband and wife and their inability to testify in each other's cases should be self-evident, to understand this connection requires some thought. It appears that Coke's point was, as the Trammel Court noted, that the spouse was disqualified for interest—because husband and wife are one, the wife has an interest in any cause in which the husband has an interest.50 Just as the husband is disqualified from testifying in his own case due to his interest in the matter, the wife likewise cannot testify in the husband's cause, in which she, being one with her husband, would have an interest equal to his. In the same passage, Coke went on to explain similarly that "in an Information upon the Statute of usurie, the partie to the usurious contract shall not be admitted to be a witnesse against the Usurer, for in effect hee should be testis in propria causa [witness in his own

45. See WIGMORE, supra note 16, at 211.
46. Id.
47. Id.
48. See COKE, supra note 40, at 623.
49. Id. at 623 n.224
cause] . . .” 51 Thus, Coke cited the wife of a party as one example of the broader category of interested parties who were considered incompetent to testify. In addition to this seemingly descriptive reason for the disqualification, Coke provided a second and what I will call a more “instrumental” rationale for the prohibition of testimony of one spouse for or against the other—such testimony might be “a cause of implacable discord and dissent between the husband and the wife, and a meane of great inconvenience.” 52

Both of these rationales for the rule, the unity rationale and the instrumental rationale, were applied in subsequent authority. For example, a few decades after the publication of Coke’s commentary on Littleton, Coke’s instrumental rationale was cited in the decision of Mary Griggs’s Case, in which the court refused to admit a first husband’s testimony against his wife, who was accused of remarrying while still married to her first husband. 53 The court cited Coke for the proposition that “a wife could not be admitted to give evidence against her husband, nor the husband against his wife in any case, excepting treason, because it might occasion implacable dissention.” 54 The unity rationale also was accepted. In the 1609 case of Bayly v. Clare, the court noted the “idemptity [sic] of person, between the husband and the wife.” 55 An exception to the general rule of disqualification was confirmed in the 1631 trial of Mervin Lord Audley for, among other things, facilitating the rape of his own wife. There the question was “[C]an a Wife be a Legal Witness against her Husband?” The judges answered that in criminal cases of this nature, where the wife is the party grieved, and on whom the crime is commited, she may. 56

In a 1684 trial captioned The Lady Ivy’s Trial, a witness, Mrs. Duffett, swore that her deceased husband had formerly conspired with Lady Ivy and had forged certain documents. 57 The defense

51. See COKE, supra note 40, at 623.
52. Id.
54. Id.
57. Lady Ivy’s Trial, 10 Howell’s State Trials 555, 622-623 (1684).
sought to introduce the deceased husband's sworn statement that the witness, Mrs. Duffett, had told him that she could get 500 pounds by swearing against Lady Ivy. The court then engaged defense counsel in the following Socratic colloquy:

L. C. J. [Lord Chief Justice]. Pray, consider with yourself, could the husband have been a witness against the wife about what she told him upon an information for that offence of subornation?

Sol. Gen. No, my lord, I think not.

L. C. J. Could the wife be an evidence against the husband for the forgery?

Sol. Gen. No, my lord, she could not; and yet she swears it upon him here.

L. C. J. That is not against him, man; he is out of the case, but against my lady Ivy; and how can the oath of the husband be evidence here?\textsuperscript{58}

The defense argued that if Mrs. Duffett's testimony that Mr. Duffett did commit forgery with Lady Ivy is to be allowed, then Mr. Duffett's own sworn denial should also be admitted. In response, the Court resoundingly rejected the statement of the deceased husband because it would tend to "fix a crime" upon his widow, noting "sure you do not intend this shall pass for argument, but to spend time."\textsuperscript{59}

In a similar vein, it was argued without dispute several years later (but still in the late seventeenth century) in the proceedings in Parliament against Sir John Fenwick upon a bill of attainder for high treason that:

\textsuperscript{58} Id. at 628.

\textsuperscript{59} Id. at 629.
what any man’s wife says cannot be made use of against him, as nothing that she says or does can be made use of for him; and by the same rule of justice, it cannot be made use of against him: for otherwise the rule would be unequal, That she might be a witness against him, but not a witness for him; that seems so unjust, that it will not be admitted in any court whatsoever.\footnote{Proceedings in Parliament Against Sir John Fenwick, 13 Howell’s State Trials 538, 582 (1696).}

The reasoning here accepts, seemingly as an axiom, that the wife cannot testify for the husband, presumably because of interest, and then concludes that it would be unfair or “unequal” to allow her testimony to be used against him, since it cannot be used for him. This case bears a resemblance to \textit{Bent v. Allot}, except that in \textit{Bent} the court concluded that equality demands that a wife who testifies for her husband must be allowed to testify for the other side. \footnote{See discussion supra notes 17-23 and accompanying text.} Here the court concludes that since a wife cannot testify for her husband, neither can she testify against him. To the extent that the court thus grounds the impermissibility of the wife’s testimony against the husband in the precise circumstance of her inability (for whatever reason) to testify for him, this casts the rule more as one of privilege than of disqualification. If the wife were disqualified altogether from testifying either for or against her husband, there would be no need to so justify the exclusion of her negative testimony by pointing to the lack of her positive testimony. Sir Geoffrey Gilbert observed similarly in the early eighteenth century that “it would be very hard that a Wife [s]hould be allowed as Evidence again[s]t her own Hu[s]band, when [s]he can’t atte[s]t for him . . . ”\footnote{Sir Geoffrey Gilbert, \textit{The Law of Evidence} 96 (1754), reprinted in \textit{The Compendium of the Law of Evidence} (Thomas Peake ed., Garland Publishing 1979).} Thus, the privilege flowed naturally as a fair corollary of the disqualification, which was assumed. If the spouse’s testimony could not be used by the husband, it was only fair and just that the husband likewise could prevent his wife from testifying against him.

While the unity of interest between the husband and wife was a leading reason cited for the disqualification of spousal testimony, the
special nature of the "one flesh" unity set the husband-wife relationship apart from other relationships that might reflect some unity of interest. For example, in the seventeenth century, Sir Matthew Hale listed the relationship of husband to wife in a list of "matters that render a man incompetent to be a witness, tho they are not such as render him infamous" \(^{63}\): "Some regularly are disabled in respect of the civil unity of their persons, as the husband regularly is not allowed to be a witness for or against the wife . . . ." \(^{64}\) Hale recognized this disability of husband and wife "in respect of the civil unity of their persons" separate and apart from any unity of interest, which he recognized as a separate disability. \(^{65}\) Thus, even as Coke's original statement of the rule seems to hint, there is something about the unity of husband and wife that makes disqualification appropriate, even apart from interest. The seventeenth-century authorities never had to address whether spouses ought to be allowed to testify if they were not disqualified for interest because the disqualification for interest was firmly established.

The disqualification carried forward unabated into the eighteenth century. Citing the passage from Coke discussed above, \(^{66}\) William Hawkins' *A Treatise of the Pleas of the Crown*, printed in 1721, acknowledged the essential unity of husband and wife:

> It seems . . . agreed, that husband and wife being as one and the same person in affection and interest, can no more give evidence for one another in any case whatsoever than for themselves; and that regularly the one shall not be admitted to give evidence against the other, nor the examination of the one be made use of against the other, by reason of the implacable dissension which might be caused by it, and the great danger of perjury from

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\(^{63}\) 2 Matthew Hale, The History of the Pleas of the Crown 278 (W.A. Stokes & E. Ingersoll eds., 1847).
\(^{64}\) Id. at 279.
\(^{65}\) Id. at 279-80.
\(^{66}\) See supra notes 40-52 and accompanying text.
taking the oaths of persons under so great a bias, and the extreme hardship of the case.\textsuperscript{67}

Thus Hawkins appeared to understand spouses to be disqualified from testifying for each other by their unity of interest and disqualified from testifying against each other by the instrumental rationale, both rationales having been earlier cited by Coke.\textsuperscript{68} Sir Geoffrey Gilbert also recognized, early in the eighteenth century, that if the wife were prohibited from testifying for her husband but permitted to testify against him, the law would "de[s]troy the very legal Policy of Marriage that has [s]o contriv’d it, that their Intere[s]t [s]hould be but one . . . "\textsuperscript{69} Thus, the husband-wife relationship stood apart and distinct from all other human relationships: "no other Relation is excluded; becau[s]e no other Relation is ab[s]olutely the [s]ame in Intere[s]t . . . "\textsuperscript{70}

Blackstone also acknowledged that "[b]y marriage, the hu[s]band and wife are one per[s]on in law."\textsuperscript{71} Thus, "in trials of any [s]ort, [husband and wife] are not allowed to be evidence for, or again[s]t, each other."\textsuperscript{72} Blackstone noted two reasons for this disability: "partly becau[s]e it is impo[ss]ible their te[s]timony [s]hould be indifferent: but principally becau[s]e of the union of per[s]on."\textsuperscript{73}

Thus in Blackstone, the disability of the spouse to testify in a matter in which he was interested was separate from and secondary to the concept of the unity of the husband and wife.\textsuperscript{74} This unity formed the basis of both the disability and the privilege. If the spouses were allowed to testify for each other, this would violate the maxim preventing anyone from testifying in his own cause, and if they were

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\textsuperscript{68} \textit{See Coke, supra} note 40 at 623; \textit{see also} supra Part I.B.
\textsuperscript{69} \textit{See Gilbert, supra} note 62, at 96.
\textsuperscript{70} \textit{Id.} at 98.
\textsuperscript{71} 1 \textit{William Blackstone, Commentaries on the Laws of England} 430 (Oxford 1765).
\textsuperscript{72} \textit{Id.} at 431.
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{See id.} (noting that the principal reason for the disqualification was the unity of person of husband and wife in the eyes of the law).
\end{flushleft}
permitted to testify against each other, this would violate the maxim permitting a defendant to decline to be a witness against himself.\(^{75}\)

It appears that it always was the case that in addition to the disqualification for interest, the unity of husband and wife also supported the privilege of husband and wife not to testify against each other, which privilege is analogous to the privilege against self-incrimination. Therefore, Sir Francis Buller’s treatise, published in the early nineteenth, discussed the interest of the spouse as a basis for the disqualification: “husband and wife cannot be admitted to be witness for each other, because their interests are absolutely the same . . . .”\(^{76}\) A separate rationale supported the privilege that prevented spouses from testifying against each other—such testimony would be contrary to “the legal policy of marriage.”\(^{77}\) Buller acknowledged that the husband-wife relationship is unique: “no other relation is excluded, because no other relation is absolutely the same in interest . . . .”\(^{78}\)

It thus appears that both the disqualification and the privilege traveled together from the beginning of recorded English history on the subject right up through the eighteenth century and that both the disqualification and the privilege were based on the essential unity of husband and wife—the former because of the unity of interest and the latter because of a policy against interposing testimony between the unity of husband and wife. But it must be noted that not all of the evidence from this period supports the concept of the absolute disqualification of spouses on the ground of interest. William Hudson’s *A Treatise of the Court of Star Chamber*, completed in 1621 and “widely published in manuscript” thereafter,\(^{79}\) provided that “the wife cannot be allowed a witne[s]s gain[s]t her hu[s]band who is plaintiff and defendant, for that they are but one per[s]on in the eye of

\(^{75}\) *Id.*


\(^{77}\) *Id.*

\(^{78}\) *Id.* at 287a.

\(^{79}\) *Thomas G. Barnes, Mr. Hudson’s Star Chamber, reprinted in A Treatise of the Court of Star Chamber*, at ii (Francis Hargrave ed., The Legal Classics Library 1986) (1635).
the law . . . . But if the defendant’s wife be perced and examined again[s]t her hu[s]band, and the hu[s]band cro[s]s-examineth also, [s]o [s]he is examined on both [s]ides, they both have allowed her, and [s]he shall be allowed of . . . .” 80 This passage begins with what appears to be a disqualification: “the wife cannot be allowed a witne[s]s gain[s]t her hu[s]band.” Immediately following this language suggesting a disqualification of the wife, the writer then imagines a scenario in which both sides “allow” the wife to testify. Thus, this passage tends to support the interpretation of Bent v. Allot, discussed above, whereby the limitation on the testimony of the spouse was in the nature of a waivable privilege, but perhaps one that could be asserted by either side. If the waiver of both parties is necessary to permit a witness to testify, then both parties hold an essential veto power over the testimony. This makes the status of spousal testimony look something like a presumptive disqualification – the spouse may not testify unless both parties agree that she may. The background rule appears to be one of disqualification, which disqualification can be overcome only by the extraordinary agreement of both parties.

C. The Absolute Disqualification Comes Under Attack in the Nineteenth Century

By the late nineteenth century, the disqualification of either spouse to testify against the other had been well-established for centuries. About that time a general move was beginning to get underway – courts were permitting juries to hear more and more testimony in various contexts in which testimony formerly had been disallowed, and not only in the context of a spouse testifying in her husband’s case. For example, Rice’s late nineteenth century American treatise on The Law of Evidence noted that “[t]he common law inhibitions which sought to disqualify through interest, consanguinity and affinity a large proportion of the witnesses best adapted to elucidate a given fact have been almost wholly abrogated . . . .” 81 Because of this

80. HUDSON, supra note 26, at 205.
81. 1 FRANK S. RICE, LAW OF EVIDENCE 526 (The Lawyer’s Co-operative Publishing Co. 1892).
movement away from categorical disqualification of witnesses, a period of transition prevailed over the common law categories of incompetency of witnesses from the late nineteenth century through the twentieth century. One-by-one, the former rules of disqualification were swept away.\textsuperscript{82} Instead of precluding a potentially unreliable witness from testifying at all through a rule of incompetency, many jurisdictions started to permit the witnesses to testify and the opponents to impeach the credibility of the witness using the factor that previously would have led to incompetency, leaving it to the fact-finder to decide whether the witness should be believed.\textsuperscript{83} For example, whereas witnesses were formerly forbidden to testify in their own cases at all, because of their interest in the matter, eventually they were permitted to testify, but the opponent could use the obvious self-interest of the witness to impeach the testimony.\textsuperscript{84}

A leader of this liberalization movement, and the father of the modern attack on spousal testimonial privilege, appears to have been Jeremy Bentham, who harshly criticized various rules of exclusion, particularly the exclusion of the testimony of spouses for and against each other.\textsuperscript{85} Bentham, and other critics of spousal disqualification, dealt with the rationales for the exclusion under the same two rationales originally cited by Coke centuries earlier.\textsuperscript{86} First, the critics disputed Coke’s instrumental rationale supporting the rule—that it promotes marital harmony.\textsuperscript{87} The critics argued either that the privilege did not, in fact, promote marital harmony or that promotion of marital harmony was not, under the circumstances, worth the cost

\textsuperscript{82} See generally McCormick, supra note 39, at § 61 (“Today most of the former grounds of barring a witness altogether have been converted into mere grounds of impeaching his credibility.”).

\textsuperscript{83} See, e.g., Fed. R. Evid. 601. See generally Rice, supra note 82, at 526-31.

\textsuperscript{84} See generally supra note 82 and accompanying text.


\textsuperscript{86} While Bentham appears to have led the attack, other critics were close behind. For example, following the footsteps of Bentham was Justice John Appleton of the Supreme Judicial Court of Maine, whose attack on the spousal disqualification closely tracks that of Bentham. See John Appleton, The Rules of Evidence, 144-55 (T. & J. W. Johnson & Co. 1860).

of forgoing the spouse's evidence.\textsuperscript{88} The common attack on the instrumental rationale was that some marriages are beyond saving.\textsuperscript{89} Coke's other rationale, the essential unity of husband and wife, was summarily dismissed through little more than mere ridicule.\textsuperscript{90}

Bentham articulated his suspicion that the instrumental rationale underlying the rule was not its original rationale, as it sounded a bit too modern to underlie such an ancient rule: "Drawn from the principle of utility, though from the principle of utility imperfectly applied, it savours of a late and polished age."\textsuperscript{91} Bentham thought that the "reason that presents itself as more likely to have been the original one, is the grimgriber, nonsensical reason—that of the identity of the two persons thus connected."\textsuperscript{92} Bentham carefully tried to dissect what he implied was the modern pretext for the rule—the idea that the disqualification promoted marital harmony.\textsuperscript{93} However, unlike his careful refutation of this supposed instrumental pretext for the rule, Bentham mounted no such attack on what he claimed was the real original basis of the rule; the "one flesh" or spousal unity

\textsuperscript{88} See id. at 483.
\textsuperscript{89} See id. at 482-85.
\textsuperscript{90} See Peter Sugar, Comment, Federal Rules of Evidence and the Law of Privileges, 15 WAYNE L. REV. 1287, 1332 (1969) (noting that the concept of spousal unity had been "fervently denounced" and given no "merit"); see also 2 FRANK S. RICE, LAW OF EVIDENCE (Lawyer's Co-operative Publishing Co. 1892), for an interesting contrast to the usual method of attack on spousal privilege. Rice contended as follows:

The true reason why husbands and wives are not allowed to be witnesses for each other, is, that they are interested in the event of the suit; the notion that they are inadmissible from policy, and irrespective of interest in the event, seems to be generally given up in England as well as here.

Id. at 987. Thus, Rice tried to limit the rationale for the disqualification or privilege to the unity of interest or disqualification for interest rationale. But Rice's approach fails for at least two reasons. First, it had been clear for centuries that there was more to the spousal unity rationale than disqualification for interest—spousal unity presented a basis for spousal testimonial privilege apart from the joint interest of the spouses. See discussion supra notes 48-73. Second, Rice's view that the interest rationale survived the instrumental or policy rationale appears to have been \textit{sui generis}. See, e.g., Trammel v. United States, 445 U.S. 40, 44 (1980) (identifying the "perceived role in fostering the harmony and sanctity of the marriage relationship" as "the modern justification for this privilege against adverse spousal testimony"); 4 BURR W. JONES, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES (Horwitz ed. 1914) ("another reason for the exclusion . . . has outlived the more technical grounds . . . Public policy demands that those living in the marriage relation should not be compelled or allowed to betray the mutual trust and confidence which such a relation implies.").

\textsuperscript{91} BENTHAM, supra note 87, at 485.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 481-83.
rationale. Instead of reasoned rejection, Bentham substituted mere scorn:

Among lawyers, among divines, among all candidates setting up for power in a rude age, working by fraud opposed to force, scrambling for whatever could be picked up of the veneration and submission of the herd of mankind,—there has been a sort of instinctive predilection for absurdity in its absurdest [sic] shape. Paradox, as far as it could be forced down, has always been preferred by them to simple truth. He who is astonished, is half subdued. Each absurdity you get people to swallow, prepares them for a greater. And another advantage is, the same figure of rhetoric which commands the admiration and obedience of the subject class, helps the memory of the domineering class: it is a sort of memoria technica.

All these paradoxes, all these dull witticisms, have this in common,—that, on taking them to pieces, you find wrapped up, in a covering of ingenuity, some foolish or knavish, and in either case pernicious, lie. It is by them that men are trained up in the degrading habit of taking absurdity for reason, nonsense for sense. It is by the swallowing of such potions, that the mind of man is rendered feeble and rickety in the morning of its days. To burn them all, without exception, in one common bonfire, would be a triumph to reason, and a blessing to mankind.⁹⁴

Bentham’s attack on the essential unity of husband and wife gained steam toward the end of the nineteenth century. For example, in Treatise on the Law of Evidence, first published in Philadelphia by Francis Wharton, the writer suggested that the privilege should not prevent the wife from voluntarily testifying against the husband since the privilege rests “mainly on sentiment.”⁹⁵ Likewise, in an 1878 case captioned Marburg v. Cole, the Court of Appeals of Maryland

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⁹⁴. Id. at 485-86.
⁹⁵. I FRANCIS WHARTON, A COMMENTARY ON THE LAW OF EVIDENCE, § 425 (1877).
commented that "the common law doctrine of the unity of husband and wife is no longer tenable in this State."\textsuperscript{96} Stewart’s treatise on the law of husband and wife labeled "the theory that husband and wife are one" a "fiction" that "has never been and is nowhere logically and broadly applied . . . ."\textsuperscript{97} Probably most importantly, Wigmore’s text, which became the standard American evidence text, also was affirmatively hostile to the concept of the unity of husband and wife, calling such unity "a piece of semimedieval metaphysics" not "worth either defending or answering"\textsuperscript{98} and "a fiction, which cannot serve as a legislative reason."\textsuperscript{99} More modern commentators have followed the lead of Bentham and Wigmore.\textsuperscript{100}

There always were exceptions to the disqualification of spouses, and one of the chief exceptions, noted above, permitted a spouse’s testimony against spouse when the trial involved a wrong by the defendant against the testifying spouse.\textsuperscript{101} Thus, falling in with the anti-disqualification tenor of the age, the Congress in 1887 expanded this exception by permitting either spouse to testify in prosecutions against the other for bigamy, polygamy, or unlawful cohabitation.\textsuperscript{102} However, with the rare exceptions noted and despite decades of attacks from commentators, both the privilege and the disqualification were consistently applied throughout the history of the United States until the early twentieth century.\textsuperscript{103} In the twentieth

\textsuperscript{96} Marburg v. Cole, 49 Md. 402, 403 (1878).
\textsuperscript{98} 2 John H. Wigmore, Evidence in Trials at Common Law § 601 (Chadbourn rev. 1979).
\textsuperscript{99} 8 John H. Wigmore, Evidence in Trials at Common Law § 2228 (McNaughton rev. 1961).
\textsuperscript{100} See, e.g., McCormick, supra note 39, at § 66 (calling the disqualification "arbitrary and misguided" and asserting that "[t]he privilege is an archaic survival of a mystical religious dogma" and "reflects an outmoded social attitude toward marriage"); Reutlinger, supra note 18, at 1359, 1359 n.24 (branding as "totally spurious" the unity and self-incrimination rationales articulated by Coke, Blackstone and others); Edward A. Fatula, Note, Should the Rule Prohibiting Antispousal Testimony Be Abolished?, 15 U. Pitt. L. Rev. 318, 320 (1954) (noting that "modern commentators reject the concept of the husband-wife unity" as "a mystical concept having no factual basis . . . .").
\textsuperscript{101} The seminal case for this exception was the 1631 trial of Lord Audley for facilitating the rape of his wife. See supra note 54 and accompanying text.
\textsuperscript{102} 24 Stat. 635 (1887).
\textsuperscript{103} Rice’s late nineteenth century treatise on Evidence, supra note 82, is a clear testimony to the stubborn stand of the disqualification of spouses against the tide of liberalized admissibility of evidence. While recognizing that the elimination of the old categories of incompetency was nearly complete, Rice nevertheless cited the relationship of husband and wife as one of the remaining exceptions to the new
century, shifting attitudes toward marriage appears to have accomplished what decades of academic comment could not—spousal disqualification, if not the privilege, finally started to erode.

It should not be surprising that this attack on the disqualification was not seriously mounted until relatively recently. The modern attack on the policy basis for the disqualification relies heavily on the idea that some broken marriages are not worth protecting, at least not at the cost of foregoing valuable evidence.\textsuperscript{104} The \textit{Trammel} Court explicitly relied on this argument.\textsuperscript{105} But when Lord Coke first articulated the instrumental rationale for the disqualification of spouses from testifying, the idea that some marriages might be unworthy of protection would have been unthinkable; marriage was

general rule of the competence of all witnesses. \textit{Id.} at 532. Rice's characterization of the disqualification of spouses also foreshadowed the shift from disqualification to privilege, see discussion infra notes 110-112 and accompanying text, which was soon to come: "A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband without his consent . . . ." RICE, \textit{supra} note 81, at 532; accord Lucas v. Brooks, 85 U.S. 436, 446 (1873) (disqualification not applicable where "testimony was given with the assent of the husband, and in entire harmony with his wishes"). This contrasts sharply with the characterization of the rule in the American Edition of Peake's respected treatise on Evidence, published sixty-eight years earlier: "this rule is so inviolable that no consent of the other party will authorize the breach of it." SIR GEOFFREY GILBERT, \textit{THE LAW OF EVIDENCE} 249 (1754), reprinted in \textit{THE COMPENDIUM OF THE LAW OF EVIDENCE} (Thomas Peake ed., Garland Publishing 1979). By implying that a spouse might consent to testimony against him, Rice was characterizing the spousal disqualification more like a privilege than a disqualification.

\textsuperscript{104} \textit{See supra} Part I.C.

\textsuperscript{105} \textit{Trammel} v. United States, 445 U.S. 40, 52 (1980). Somewhat at odds with this pervasive idea, that spousal testimony poses no threat to marital harmony since there must not be any harmony to begin with if one spouse is willing to testify voluntarily against the other, is the fact that adverse spousal testimony is frequently, as in \textit{Trammel}, given by an admittedly guilty spouse pursuant to a grant to immunity. \textit{See, e.g.}, United States v. Espino, 317 F.3d 788, 791 (8th Cir. 2003) (involving a wife, who had pre-existing and ongoing involvement in drug distribution enterprise, who testified against her husband in exchange for a reduced sentence); United States v. Parker, 834 F.2d 408, 412 (4th Cir. 1987) (involving a witness spouse who was not prosecuted for her admittedly voluntary and active participation in murder and who "voluntarily" testified against her husband); United States v. Neal, 743 F.2d 1441, 1444 (10th Cir. 1984) (involving a witness spouse who hid and spent proceeds of bank robbery, testified against her husband under immunity, and "cooperated with the police to avoid the possibility of going to jail"); United States v. Knapson, 743 F.2d 1450, 1454 (10th Cir. 1984) (involving a witness spouse who testified against her husband under a grant of immunity from prosecution). For the government to cite the testimony of one spouse against the other as evidence of the brokenness of the marriage, which brokenness is then cited as a justification for permitting the testimony, has a circular feel to it, but this testimony, brokenness, testimony merry-go-round is all the more troubling where the testimony that supposedly shows the brokenness of the relationship is extracted under threat of prosecution.
thought to be a permanent state for the married couple.\textsuperscript{106} However, beginning in the late nineteenth or early twentieth century, things began to change. Judge Richard Posner observed that “between about 1920 and 1980 there were dramatic changes in sexual mores, both in the United States and in most other Western countries.”\textsuperscript{107} The marriage rate fell and divorce became much more common.\textsuperscript{108} This trend has continued until today, where formal marriage has rapidly become optional for cohabitating couples.\textsuperscript{109} One writer of a student Note keenly observed that in our modern times, “if a spouse can end the marital relation by her own wish she should also be allowed to do some lesser act which would merely weaken the marital relation.”\textsuperscript{110} This changed attitude toward the importance and permanence of marriage appears to have made commentators, and eventually courts, more willing to question the health and worth of individual marriages, which in turn allowed the Courts to find that protecting such weak marriages was not worth foregoing potentially valuable evidence.\textsuperscript{111}

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  \bibitem{footnote106} See \textit{W.I.T., Jr., Note, Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend}, 38 VA. L. REV. 359, 374 (1952) (noting that in the 17th century, “the only method of obtaining a divorce was by special act of Parliament.”).
  \bibitem{footnote108} \textit{Id. See generally id.} at 55 (noting that “the divorce rate skyrocketed” between 1920 and 1980); Hutchins and Slesinger, \textit{Some Observations on the Laws of Evidence: Family Relations}, 13 MINN. L. REV. 675, 678 (1929); \textit{W.I.T., Jr., supra note 106}, at 374; Jack Klingensmith, Comment, \textit{The Husband-Wife Evidentiary Privileges in Criminal Proceedings}, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 74, 83 (1961) (noting the “mounting” divorce rate); Joseph A. Fawal, Comment, \textit{Questioning the Marital Privilege: A Medieval Philosophy in a Modern World}, 7 CUMB. L. REV. 307, 321 (1976) (observing that “the family has lost some of its importance” and that “the divorce rate is higher than at any other time in our history”) (internal citation omitted).
  \bibitem{footnote109} \textit{Posner, supra note 107}; Terri S. O’Brien, Note, \textit{The Husband-Wife Evidentiary Privileges: Is Marriage Really Necessary?}, 1977 ARIZ. ST. L.J. 411, n.1 (noting that there were 1,320,000 unmarried Americans living with a member of the opposite sex in 1976 compared to only 654,000 in 1970).
  \bibitem{footnote110} \textit{See W.I.T., Jr., supra note 106}, at 374. The same point was made without attribution and using strikingly similar language in two later student comments. See Klingensmith, \textit{supra note 108}, at 84 (“if a spouse can end the marital relationship by her own wish, she should also be permitted to commit a lesser act which may only weaken the marriage”); Edwin L. Noel, Comment, \textit{Husband-Wife Evidentiary Privileges: The Power of the Federal Courts to Seek a Rational Solution}, 17 ST. LOUIS U. L.J. 107, 122 (1972) (“if a spouse can end the marital relationship by her own wish, she should also be permitted to commit a lesser act that may also weaken the marriage”).
  \bibitem{footnote111} \textit{See generally Lenore J. Weissman, Legal Regulation of Marriage: Tradition and Change}, 62 CAL. L. REV. 1169 (1974) (proposing that the longstanding legal structure of marriage is anachronistic). One of the earliest commentators willing to suggest that some marriages might be past saving was
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But this new willingness of judges to decide when it is time to give up on individual marriages was slow in developing, particularly in the United States. As late as 1949, no less influential an American jurist than Learned Hand noted that "not all estrangements are final and nothing could more dispose the privileged spouse to treasure enmity and to repulse any overtures of reconciliation than the memory of what will ordinarily rankle as treachery." Hand argued in *United States v. Walker* that it was neither "practicable" nor "desirable to make the decision whether to apply the privilege dependent upon the judge's conclusion that in the instance before him the marriage has already been so far wrecked that there is nothing to save." Even nine years later, in 1958, the Supreme Court explicitly rejected the suggestion that some marriages are not worth trying to save, noting that "not all marital flare-ups in which one spouse wants to hurt the other are permanent" and that "some apparently broken homes can be saved provided no unforgivable act is done by either party." "Until 1975, no federal court had denied the testimonial privilege on the ground that the marriage lacked marital

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Justice John Appleton of the Supreme Judicial Court of Maine. In his treatise on the law of Evidence, Appleton argued that the promotion of domestic tranquility does not support spousal disqualification in those instances where a wife might testify falsely against her husband because "then, most manifestly, domestic felicity must have passed away—the twain must long ago have ceased to be one flesh." Appleton, supra note 86, at 147. More modern commentators have not hesitated to question the health of individual marriages. See, e.g., McCormick, supra note 37 ("family harmony is almost always past saving when the witness spouse is willing to aid the prosecution"); Paul F. Rothstein, A Re-evaluation of the Privilege Against Adverse Spousal Testimony in the Light of its Purpose, 12 INT'L & COMP. L.Q. 1189, 1193-99 (1963) (discussing in some detail how a court might go about assessing whether a marriage involves any harmony worth preserving); Klingsmith, supra note 102, at 83-84 (bemoaning the privilege's exclusion of "valuable evidence, even where the marriage serves no useful social purpose"); Noel, supra note 110, at 121 ("if a wife is willing to testify against her husband it is doubtful whether there is anything in the marriage worth saving"). Most commentators seem to recognize that asking the court to judge the value of a marriage is a nasty business. Perhaps the best answer to this concern has been the oft-repeated observation that by vesting the privilege in the testifying spouse (as the Court did in *Trammel*), the value of the marriage is judged not by the court but by the testifying spouse. But where, as in *Trammel*, the choices of the witness spouse are to go to jail herself or to help put her husband in jail, the marriage appears doomed to damage by incarceration in any event—the only question is which spouse will be incarcerated.

113. Id. at 568.
115. Id. at 78.
Thus, throughout this period of growing liberalization of the standards governing who may testify, the absolute disqualification of the spouse in American courts remained fairly firm for more than a century. Yet the seeds of judicial willingness to question first the disqualification and, ultimately, the privilege, were sown in the soil of the disintegration of the traditional marriage.

D. The Shift from Disqualification to Privilege in the Mid-Twentieth Century

The movement toward liberalized admission of evidence in America finally reached the absolute disqualification of the spouse in 1933 when the Supreme Court abolished the absolute testimonial disqualification in federal courts in *Funk v. United States*, thereby permitting the spouse of a defendant to testify on the defendant's behalf. 117 Although the Court's decision in *Funk* finally shattered the common law's absolute disqualification of the spouse as a witness, the Court's decision required no great leap in the law's rationale. A privilege served the original rationales of the rule just as well as an absolute disqualification would. To the extent that the disqualification was built upon the separate rule disqualifying witnesses with a personal interest in the case combined with the long-accepted concept of the unity of husband and wife, this structure supporting the rule was no longer sound, as the disqualification for interest had been rejected. 118 The original idea was that because a party could not testify in his own case, neither could his spouse, who was one with him. However, the modern wave of more permissive rules of witness competence had long swept away the old disqualifications because of interest. 119 Since the now missing disqualification of interested witnesses had provided much of the

118. See, e.g., *id.* at 380 (noting that the common law rules disqualifying persons having an interest from testifying have long since been abolished in the United States).
119. *id.*
supporting structure for the absolute spousal disqualification,\(^{120}\) the removal of the general disqualification for interest left the absolute spousal disqualification without much of its historical support.\(^{121}\) Once defendants were allowed to testify in their own cases, it no longer made any sense to maintain the disqualification of a spouse to testify for the defendant because of interest when the defendant himself, who obviously was interested in his own case, was permitted to testify in his own behalf. As the *Funk* Court put it, "a refusal to permit the wife upon the ground of interest to testify in behalf of her husband, while permitting him, who has the greater interest, to testify for himself, presents a manifest incongruity."\(^{122}\)

Neither does the instrumental rationale require a disqualification rather than a privilege. While it reasonably might be feared that one spouse’s testimony against another could create marital discord, there is no reason to think that one spouse’s testimony in favor of another would create disharmony within the marriage. The *Funk* Court described any such concern as “altogether fanciful.”\(^{123}\) While the *Funk* Court was doing away with the absolute disqualification, the Court did not address the common-law privilege that allowed either spouse to prevent the other from testifying against the party spouse.\(^{124}\) The rule governing spousal testimony thus evolved from a rule of absolute disqualification into a rule of privilege.\(^{125}\)

Though the Court’s opinion in *Funk* left the spousal testimonial privilege intact, the privilege continued to come under attack. As the majority opinion in *Trammel* noted, the mid-twentieth century witnessed a series of assaults on the privilege:\(^{126}\) in 1938 the Committee on Improvements in the Law of Evidence of the American Bar Association called for the abolition of the privilege

\(^{120}\) See *id.* ("The exclusion of the husband or wife is said by this Court to be based on his or her interest in the event.").

\(^{121}\) See *id.*

\(^{122}\) *Id.* at 381.

\(^{123}\) *Id.*

\(^{124}\) See generally *id.* at 373 (framing the issue to be decided in the case as whether the wife of the defendant on trial is a competent witness on his behalf).

\(^{125}\) See, e.g., *Trammel*, 445 U.S. at 44 (noting that after *Funk*, the rule “evolved into one of privilege rather than absolute disqualification . . . .”).

\(^{126}\) *Id.* at 44.
itself,\textsuperscript{127} the American Law Institute, in its 1942 Model Code of Evidence, advocated a privilege for marital confidences, but expressly rejected a rule vesting in the defendant the right to exclude all adverse testimony of his spouse;\textsuperscript{128} and in 1953, the Uniform Rules of Evidence, drafted by the National Conference of Commissioners on Uniform State Laws, proposed to follow a similar course in limiting the privilege to confidential communications and abolishing "the rule, still existing in some states, and largely a sentimental relic, of not requiring one spouse to testify against the other in a criminal action."\textsuperscript{129}

Yet again, spousal testimonial privilege withstood such attacks of critics for decades. Before the Court's decision in \textit{Trammel}, the governing authority over spousal testimonial privilege in American federal courts was the Supreme Court's 1958 decision in \textit{Hawkins v. United States}.\textsuperscript{130} In \textit{Hawkins}, the petitioner had been convicted of "transporting a girl from Arkansas to Oklahoma for immoral purposes."\textsuperscript{131} Over petitioner's objection, the district court permitted the Government to use his wife as a witness against him.\textsuperscript{132} In \textit{Hawkins}, the government argued for the rule eventually adopted in \textit{Trammel}: that the spouse could not be compelled to testify but could voluntarily choose to testify.\textsuperscript{133}

While the Supreme Court in \textit{Hawkins} retained the defendant spouse's privilege to object to his spouse's testimony against him,\textsuperscript{134} the Court avoided reliance on the essential unity of husband and wife. The Court noted that the courts in this country had always accepted the common law rule "that husband and wife were incompetent as witnesses for or against each other."\textsuperscript{135} The Court identified two

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\item \textsuperscript{127} \textit{Trammel}, 445 U.S. at 45; 63 A.B.A. REPORTS 594-595 (1938).
\item \textsuperscript{128} See \textit{MODEL CODE OF EVID. R. 215} (1942) ("The privilege when it comes into existence ordinarily belongs to the communicating spouse.").
\item \textsuperscript{129} \textit{Trammel}, 445 U.S. at 45 (quoting UNIF. R. EVID. 23(2)); See UNIF. R. EVID. 23(2); see also id. at 23(2) cmts.
\item \textsuperscript{130} \textit{Hawkins v. United States}, 358 U.S. 74 (1958).
\item \textsuperscript{131} \textit{id.} at 74.
\item \textsuperscript{132} \textit{id.}
\item \textsuperscript{133} \textit{id.} at 77.
\item \textsuperscript{134} \textit{id.} at 79.
\item \textsuperscript{135} \textit{id.} at 75.
\end{itemize}
rationales for the rule: "The rule rested mainly on a desire to foster peace in the family and on a general unwillingness to use testimony of witnesses tempted by strong self-interest to testify falsely."\textsuperscript{136} Thus, the Court relied on the interest rationale and the instrumental rationale, but divorced both from the concept of spousal unity. Even when the Court cited Coke for the idea that "[s]ince a defendant was barred as a witness in his own behalf because of interest, it was quite natural to bar his spouse in view of the prevailing legal fiction that husband and wife were one person," the Court limited this reference to spousal unity to the already-rejected "interest" rationale for the disqualification.\textsuperscript{137} Thus, by the time the Supreme Court decided \textit{Hawkins} in 1958, Coke's spousal unity rationale was thought to have been limited to disqualification for interest; any consideration of the essential unity of husband and wife, apart from unity of interest, as a rationale for the long-accepted privilege appears gone. The instrumental rationale remained, but it was completely separated from the idea of spousal unity:

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.\textsuperscript{138}

The Court explicitly rejected the government's invitation to judge the value of the petitioner's marriage.\textsuperscript{139} Noting that "there is still a widespread belief, grounded on present conditions, that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences," the \textit{Hawkins} Court rejected "the idea that an exclusionary rule based on the persistent instincts of several centuries should now be

\textsuperscript{136} \textit{Hawkins}, 358 U.S. at 75.
\textsuperscript{137} Id. at 74.
\textsuperscript{138} \textit{Hawkins}, 358 U.S. at 77.
\textsuperscript{139} See id. (holding that the exclusionary rule should still be followed even if adverse testimony by one spouse against the other would likely destroy the marriage).
abandoned.”¹⁴⁰ In a questioning concurring opinion, which was skeptical of the ancient idea of the unity of husband and wife underlying the spousal testimonial privilege, Justice Stewart noted the difficulty of the government’s argument on the facts of that case that the testimony of petitioner’s spouse against him was “voluntary”:

A supplemental record filed subsequent to the oral argument shows that before “Jane Wilson” testified, she had been imprisoned as a material witness and released under $3,000 bond conditioned upon her appearance in court as a witness for the United States. These circumstances are hardly consistent with the theory that her testimony was voluntary. Moreover, they serve to emphasize that the rule advanced by the Government would not, as it argues, create “a standard which has the great advantage of simplicity.” On the contrary, such a rule would be difficult to administer and easy to abuse. Seldom would it be a simple matter to determine whether the spouse’s testimony were really voluntary, since there would often be ways to compel such testimony more subtle than the simple issuance of a subpoena, but just as cogent.¹⁴¹

Consistent with the rule laid down by the Hawkins Court, the Committee on the Federal Rules of Evidence in its 1969 Proposed Draft Rules of Evidence included a husband-wife privilege, which would essentially have codified the Hawkins rule and eliminated the privilege for confidential marital communications.¹⁴² The Advisory Committee’s Note to the draft rule divided the “rules of evidence [that] have evolved around the marriage relationship”¹⁴³ into four categories:

¹⁴⁰. Id. at 79.
¹⁴¹. Id. at 82-83. Justice Stewart likewise filed an “I told you so” concurrence more than twenty years later in Trammel. Trammel v. United States, 445 U.S. 40, 54 (1980) (Stewart, J., concurring).
¹⁴². PROPOSED RULES OF EVIDENCE FOR THE U.S. DISTRICT COURTS AND MAGISTRATES, 46 F.R.D. 161, 263 (Preliminary Draft 1969) (“An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.”).
¹⁴³. Id.
(1) incompetency of one spouse to testify for the other; (2) privilege of one spouse not to testify against the other; (3) privilege of one spouse not to have the other testify against him; and (4) privilege against disclosure of confidential communications between spouses, sometimes extended to information learned by virtue of the existence of the relationship.”

The 1971 revised draft of the proposed rules was substantially similar. It was against this backdrop that the Trammel Court decided whether to allow Elizabeth Trammel to testify for the prosecution over her husband’s objection, pursuant to her grant of immunity by the prosecution.

II. ARGUMENT

The Trammel Court swept aside the “ancient foundations” for the spousal testimonial privilege by first misapprehending those foundations, and then rejecting the Court’s own misapprehension. As is often the case with error, the foundation of the Court’s decision in Trammel is mostly true. In the crucial passage of its opinion, the Court cited two medieval doctrines “that an accused was not permitted to testify in his own behalf because of his interest in the proceeding and that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one,” and proclaimed both of those doctrines “long-abandoned.” The majority followed that pronouncement with the following supporting statement: “Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being.”

144. Id.
146. Id. at 44. See discussion supra Introduction and text accompanying notes 5-7.
147. Id. at 52.
Therefore, the Court could finally announce that the foundations for the privilege had “long since disappeared.”\textsuperscript{148}

But the Court was able to waive both of these doctrines in their entirety only by combining multiple propositions into two rejected doctrines. But the \textit{Trammel} Court alluded to not two doctrines, as it claimed, but at least three: (1) the rule prohibiting defendants from testifying in their own behalf was indeed important to the ancient roots of the spousal disqualification, as the Court claimed;\textsuperscript{149} (2) the concept that husband and wife are one also was important to the privilege’s ancient roots;\textsuperscript{150} and (3) the proposition that, during the feudal era in England, a married woman frequently was treated as having “merged into” her husband, thus losing her own separate legal existence, was true.\textsuperscript{151} The Court made two doctrines out of three by combining the two distinct concepts that “husband and wife [are] one” and that “the husband was that one.”\textsuperscript{152} These concepts are not necessarily connected, and the Court unthinkingly rejected the former concept because of the general rejection of the latter.\textsuperscript{153}

Of the three doctrines embedded in this crucial passage of the Court’s opinion, only the first and last have been “long-abandoned;” the concept that husband and wife are one is alive and well. And only the first and second doctrines are important to the “ancient roots” of the spousal testimonial privilege; the disappearance of the wife’s separate legal existence is not important to the privilege in any way.\textsuperscript{154} Thus, the \textit{Trammel} Court’s error was that while the concept of husband and wife as one is important to spousal testimonial privilege, this general proposition of spousal unity has not been

\begin{footnotes}
\footnote{148. \textit{Id.}}
\footnote{149. \textit{Id.} at 44.}
\footnote{150. \textit{Id.}}
\footnote{151. \textit{See generally, Trammel}, 445 U.S. at 44 (“the woman had no separate legal existence . . . .”).}
\footnote{152. \textit{Id.} at 44.}
\footnote{153. \textit{See} Ransom H. Tyler, \textit{Commentaries on the Law of Infancy, Guardianship and Custody of Infants, and the Law of Coverture, Embracing Dower Marriage and Divorce, and the Statutory Policy of the Several States in Respect to Husband and Wife} 313-14 (1868) (conceding that “[t]he rule of the common law is in many respects cruel and oppressive, and not in accordance with the existing state of society . . . .”).}
\footnote{154. \textit{See supra} Part I.}
\end{footnotes}
rejected in Anglo-American society. Moreover, the idea that has been long discredited—that the wife “merges into” the husband—has never been important to the privilege. While recognizing that Coke’s description of the relationship between husband and wife is foundational to the privilege, modern American courts, most importantly the Trammel Court, have misunderstood the implications of Coke’s statement that a husband and wife are “two souls in one flesh” and have confused it with the feudal concept of coverture. For example, the United States Court of Appeals for the Third Circuit in 1929 called Coke’s description a “fiction” that “arose in medieval England.” Similarly, the Trammel majority purported to reject the medieval “concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one.” These modern American authorities completely misconceive the much more ancient concept to which Coke’s Commentary alluded.

155. See infra Part II.B.
156. See supra Part I.B.
158. Trammel v. United States, 445 U.S. 40, 44 (1980). To the extent that the Court’s characterization of the concept of marriage underlying the spousal testimonial privilege is misguided, the Court may not be entirely to blame—it may have been led astray by undue reliance on commentary. While the Court cited no authority for the proposition that “husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one, the phrasing of this passage in Trammel’s majority opinion is strikingly similar to language used in Edwin Noel’s student Comment, published several years earlier: “These are not times when rules of evidence can be founded on the concept that husband and wife are one, and that one is the husband.” That comment can be found supra note 110, at 119.
A. Two Conceptions of Spousal Unity

1. Is Marriage More Like a Corporate Merger or a Consolidation?

The joining of husband and wife can be and has been understood in two drastically different ways. American corporate law distinguishes between a merger and a consolidation. 159 I will analogize one view of the joining of husband and wife to the merger of two corporations and the other view to the corporate consolidation. “A merger is the absorption of one or more existing corporations by another existing corporation which retains its corporate identity; a consolidation is the unification of two or more existing corporations into a new corporate entity.” 160 In a merger, one constituent corporation merges into and becomes part of another constituent corporation, which continues in existence. Only the latter constituent corporation continues. 161 In a consolidation, two corporations combine to form a new corporation created by the combination of the constituent entities—both constituent entities lose their former separate existences. 162

2. The Trammel Court Rejected the Wrong Conception of Spousal Unity

a. The Trammel Court Chose to Address the “Merger” View of Marriage

The conception of the unity of husband and wife rejected by the Court in Trammel was the idea that the wife “merged into” her husband, thus losing her separate existence into his, while his existence continued, having absorbed hers. 163 This concept of “coverture” arose in the middle ages. The wife’s “personal existence”

160. Id.
161. DEL. CODE ANN. tit. 8, § 259(a) (2005).
162. Id.
163. Trammel, 445 U.S. at 44.
was thought to merge "for most purposes in that of her husband." Supra note 153, at 312 ("Such coverture has been the rule ever since the adoption of the feudal system."). But if the spousal unity underlying the testimonial privilege can mean unity in the consolidation sense rather than the merger sense, then the oppressive concept of coverture, by which the wife's separate existence disappears into that of the husband, is not a necessary concomitant of the unity of husband and wife, but rather was merely an "institution of usages and laws conformable to the peculiar policy of the feudal system . . . ". Supra Part I.A. A marriage need not be and has not always been thought of as a merger, with the husband as the surviving entity, and the policies underlying spousal testimonial privilege in no way rely on the merger conception of marriage. Supra Part I.

Indeed, the Trammel Court does not even attempt to show the connection between the privilege and the merger vision of marriage to which it alludes. Supra Part I. It appears that the Court's appeal to the concept of "wife as chattel" is nothing more than a rhetorical device. The view of marriage as a sort of consolidation is much older than the view rejected by the Court, and has never, unlike the merger view, been rejected by Anglo-American society. Supra Part I.

Thus, the Trammel Court's purported rejection of the demeaning idea of "wife as chattel" is a straw man. The origin of this straw man employed by the Court is easy enough to trace; the Court appears to have adopted uncritically the slanted advocacy presented by the government in the case. Despite Wigmore's initial confession of ignorance concerning the origin of the privilege, his text goes on to speculate:

164. 1 THEOPHILUS PARSONS, LAW OF CONTRACTS 283 (1857).
165. Id. at 283.
166. Gould v. Gould, 29 How. Pr. 441, 464 (N.Y. Common Pleas 1865) (Daly J., dissenting); Tyler, supra note 153, at 312 ("Such coverture has been the rule ever since the adoption of the feudal system.").
167. See supra Part I.
168. See Trammel, 445 U.S. at 44 ("The modern justification for the privilege against adverse spousal testimony is its perceived role in fostering the harmony and sanctity of the marriage relationship.").
169. See infra Part II.B.
170. See discussion supra Part I.A.
Possibly the true explanation is, after all, the simplest one, namely, that a natural and strong repugnance was felt (especially in those days of closer family unity and more rigid paternal authority) to condemning a man by admitting to the witness stand against him those who lived under this roof, shared the secrets of this domestic life, depended on him for sustenance and were almost numbered among his chattels.\textsuperscript{171}

Obviously, Wigmore did not know the original basis of the privilege.\textsuperscript{172} He admitted as much. He nevertheless went on to speculate concerning the privilege’s theoretical foundation, but, to Wigmore’s credit, he made it clear that his speculation was just that; so perhaps he can be absolved from blame when his speculation turns out to be wrong.

A reading only of Wigmore’s speculation and the \textit{Trammel} Court’s opinion gives the impression that the Court swallowed Wigmore’s speculated explanation uncritically.\textsuperscript{173} But there is an intermediate step from Wigmore to Burger’s majority opinion that explains the Court’s error. The Court apparently made the mistake of relying for its research on the briefs of advocates. The Carter administration’s brief deceptively stripped Wigmore of all of his confessed uncertainty. Gone are the phrases “tantalizing obscurity” and “no certain record.”\textsuperscript{174} The brief boldly cited Wigmore’s guess as fact, stripped of Wigmore’s scholarly qualifications.\textsuperscript{175} So while Wigmore confessed a “tantalizing obscurity” and that he knew of “no certain record” of the origin of the privilege before he speculated about the “possibly true explanation,”\textsuperscript{176} the Carter administration’s brief edited out these qualifying phrases and quoted Wigmore instead for the flat assertion that the privilege “was born of a generally held repugnance to condemning a man by the testimony of one ‘who lived under his

\begin{itemize}
\item \textsuperscript{171} See \textit{Wigmore, supra} note 16.
\item \textsuperscript{172} See \textit{supra} Part I.A.
\item \textsuperscript{173} Compare \textit{Wigmore, supra} note 116 with \textit{Trammel}, 445 U.S. at 44-45.
\item \textsuperscript{174} \textit{Id}.
\item \textsuperscript{176} \textit{Wigmore, supra} note 16.
\end{itemize}
roof, shared the secrets of his domestic life, depended on him for sustenance and [was] almost numbered among his chattels.\textsuperscript{177}

Even if the government’s brief and the \textit{Trammel} Court had fairly cited Wigmore, which they did not, Wigmore’s admittedly speculative explanation for the basis of the privilege is far from tight; it leaves Wigmore without an explanation for the differing treatment of the father-child relationship. For example, if a wife were the chattel of the husband, so the child was a chattel of the father, yet children were not similarly disqualified from testifying against their fathers.

b. \textit{Coke’s View of Marriage}

The view of marriage that the \textit{Trammel} Court chose to reject was not Coke’s view. While the idea of the wife’s separate existence being merged into that of her husband may have arisen in medieval England as the \textit{Trammel} Court suggested,\textsuperscript{178} the idea of a husband and wife becoming “two souls in one flesh,” as Coke suggested,\textsuperscript{179} did not arise in medieval England—its roots run much deeper than that.

\textbf{(1) The Biblical Concept of “Two Souls in One Flesh”}

In the seventeenth century, the Bible was a ready source of authority on all topics for learned men like Coke:

> It should be borne in mind that the intellectual and spiritual climate of the 1600’s was quite different from our time. . . . In the 17th century they looked to the Bible and theological principles in general. The most learned, the profoundest thinkers,

\textsuperscript{178} \textit{Trammel}, 445 U.S. at 44.
\textsuperscript{179} \textit{See supra} Part I.B.
had recourse to the Bible on almost all questions, especially on public law and principles of justice. 180

The phrase used by Coke, "duae animae in carne una [two souls in one flesh],"181 is a biblical phrase—an obvious allusion to the biblical conception of the relationship of the husband and wife. The phrase "duo in carne una" appears five times in the Vulgate, the translation of the Christian Bible into Latin,182 which would have been familiar to Coke. These and other biblical passages "lay in the minds of theologians, canonists, and popes—and many others too, including many devout layfolk—as they handled the marriage problems and disputes of medieval Europe."183 Clearly, Coke would have been intimately familiar with these biblical passages, and he would have taken them as legally authoritative.184

(a) "Two Souls in One Flesh" Starts in Genesis

The first biblical occurrence of "two souls in one flesh" is the account in the book of Genesis of God's creation of the first family.185 This origin of the phrase provides the foundation for the understanding of the four other uses of the same phrase in the Vulgate and for understanding Coke's use of the phrase in his *Commentary Upon Littleton*.186 According to the Genesis account, God had just completed a series of creative "days," and after each "day," God had looked at what He had created and pronounced it "good."187 But God found one aspect of His creation to be "not good": "It is not good that the man should be alone; I will make him an help meet for him."188 The Hebrew word translated in the King

181. *See COKE, supra* note 40 at 623.
183. *Id.*
184. *See, e.g., Calvin's Case, 77 Eng. Rep. 377, 392 (K.B. 1608) (arguing that natural law is supreme law, Coke called Moses "the first reporter or writer of law in the world.").*
186. *See COKE, supra* note 40 at 623.
188. *Genesis* 2:18.
James Bible as “meet” can have various meanings including “straight forward,” “corresponding,” “parallel,” and “opposite.” Thus, when the writer of Genesis (Moses, by tradition) indicates that God determined to make a “help meet” for man, that means that He intended a “suitable counterpart.” It took a particular creature to be a suitable counterpart for man.

Returning again to the Genesis account, God brought to the first man the animals that God had created so that Adam could name them, but none of the animals was found to be “an help meet for him.” Thus, the writer of Genesis takes issue with the idea that a dog is, or can be, “man’s best friend,” man needed another friend, one more suitable to him. The Genesis account of Adam’s response when God created Eve and brought her to Adam suggests that Adam recognized that he had, in some meaningful way, been incomplete before:

And Adam gave names to all cattle, and to the fowl of the air, and to every beast of the field; but for Adam there was not found an help meet for him. And the LORD God caused a deep sleep to fall upon Adam, and he slept: and he took one of his ribs, and closed up the flesh instead thereof; And the rib, which the LORD God had taken from man, made he a woman, and brought her unto the man. And Adam said, This is now bone of my bones, and flesh of my flesh: she shall be called Woman, because she was taken out of Man.

Immediately following Adam’s declaration upon seeing the specially created woman comes the clause to which Coke alludes: “Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh.”

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189. Many scholars dispute the tradition of Moses as the author of Genesis and contend that Genesis was written by various authors. For present purposes, the precise human authorship of Genesis is unimportant, but since I am trying to get inside the mind of Lord Coke and other medieval scholars, I am inclined, for this exercise, to think of the author of Genesis as Coke likely would.
biblical account referenced by Coke provides a model of marriage that does not match the wife as chattel model that the Trammel Court rejects.\footnote{Trammel, 445 U.S. at 52.} To the contrary, Genesis provides the seeds of what Judge Richard Posner calls the “companionate” form of marriage—a conception of marriage that has raised the status of women wherever it has been adopted.\footnote{See POSNER, supra note 107, at 157 (noting that “strong hints” of a “companionate” form of marriage are “in the Bible, beginning with the story of Adam and Eve”).}

(b) Jesus’ Gloss on “Two Souls in One Flesh”

The second and third occurrences of Coke’s phrase in the Bible were written down many centuries after Genesis was penned.\footnote{See generally Matthew 10:7-8; Mark 19:5.} In parallel gospel accounts, both St. Matthew and St. Mark record Jesus’ response to questions from first-century experts of Jewish law.\footnote{See id.} There was a dispute among Jewish authorities at the time concerning the proper grounds for divorce. This dispute can be seen in the Mishnah, a book of legal rules compiled by Jewish authorities in second-century Palestine. The Mishnah records three divergent views on the topic: (1) “The school of Shammai holds that a man may not divorce his wife unless he has found in her a matter of sexual impropriety;” (2) “The school of Hillel holds that he may divorce her even if she merely burned his dinner;” and (3) a third view holds that a man may divorce his wife for no fault whatsoever.\footnote{Judith Romney Wegner, Chattel or Person? The Status of Women in the Mishnah 46 (1988).} The Pharisees asked whether it was permissible for a man to divorce his wife “for every cause.”\footnote{Matthew 19:3.} Both Jesus and these questioning Pharisees started their analysis of the question by considering the scriptural teachings of the Torah. The only mention of divorce in the Pentateuch provides that

[w]hen a man hath taken a wife, and married her, and it come to pass that she find no favour in his eyes, because he hath found

\footnote{193. Trammel, 445 U.S. at 52.} 
\footnote{194. See POSNER, supra note 107, at 157 (noting that “strong hints” of a “companionate” form of marriage are “in the Bible, beginning with the story of Adam and Eve”).} 
\footnote{195. See generally Matthew 10:7-8; Mark 19:5.} 
\footnote{196. See id.} 
\footnote{197. Judith Romney Wegner, Chattel or Person? The Status of Women in the Mishnah 46 (1988).} 
\footnote{198. Matthew 19:3.}
some uncleanness in her: then let him write her a bill of divorcement, and give it in her hand, and send her out of his house. And when she is departed out of his house, she may go and be another man’s wife. And if the latter husband hate her, and write her a bill of divorcement, and giveth it in her hand, and sendeth her out of his house; or if the latter husband die, which took her to be his wife; Her former husband, which sent her away, may not take her again to be his wife, after that she is defiled; for that is abomination before the LORD.\textsuperscript{199}

The Jewish authorities of Jesus’ time accepted the idea that a man could unilaterally divorce his wife, differing only over what grounds would be acceptable.\textsuperscript{200} But Matthew and Mark portray Jesus as taking the highest possible view of marriage, with a correspondingly dim view of divorce. In giving His answer, Jesus quoted the same one-flesh teaching from Genesis to which Coke alluded in his seminal text on spousal disqualification: “For this cause shall a man leave his father and mother, and cleave to his wife; and they twain shall be one flesh.”\textsuperscript{201} Jesus then adds his own conclusion: “Wherefore they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder.”\textsuperscript{202} Because it emphasizes the sanctity of the union of a man and wife, this teaching does not match the feudal concept of coverture and certainly is a far cry from the \textit{Trammel} Court’s idea of wife as chattel.

\textit{(c) St. Paul on “Two Souls in One Flesh”}

The final two Vulgate appearances of \textit{duo in carne una} are in the writings of St. Paul—once in a passage warning against sexual impurity\textsuperscript{203} and once in Paul’s most extensive extant teaching on marriage and the family.\textsuperscript{204} As part of this latter teaching, Paul

\begin{itemize}
\item \textsuperscript{199} \textit{Deuteronomy} 24:1-4.
\item \textsuperscript{200} See \textit{Wegner}, supra note 197; \textit{Gittin} 3:2.
\item \textsuperscript{201} \textit{Mark} 10:7-8; see also \textit{Matthew} 19:5.
\item \textsuperscript{202} \textit{Matthew} 19:6; see also \textit{Mark} 10:8-9.
\item \textsuperscript{203} \textit{1 Corinthians} 6:16.
\item \textsuperscript{204} \textit{Ephesians} 5:22-6:4.
\end{itemize}
advised that husbands ought to “love their wives as their own bodies.”205 In explaining that “he that loveth his wife loveth himself,”206 Paul quoted Moses’ famous words concerning a man and woman who marry and become “one flesh.”207 Paul clearly taught that in marriage, each marriage partner, in a meaningful sense, gives up his and her own separate existence: “The husband must give the wife what is due to her, and the wife equally must give the husband his due. The wife cannot claim her body as her own; it is her husband’s. Equally, the husband cannot claim his body as his own; it is his wife’s.”208 Thus, the biblical view of marriage to which Coke alluded clearly is the consolidation view, not the merger view rejected by the Trammel Court.209 These teachings bear little or no resemblance to the idea of “wife as chattel” that the Trammel Court rejected.210

(2) The Nature of Coke’s View of Marriage

(a) Disabilities of Married Partners

Of course, both conceptions (the consolidation and the merger views) of the unity of husband and wife in marriage involve disabilities of the constituent entities to the marriage. The feudal view of the wife’s having her own existence merged away into that of the husband resulted in tremendous legal disabilities for the wife, particularly when it came to contracts.211 Under this merger view of

206. Id.
208. 1 Corinthians 7:3-4.
209. See supra Part II.A.1-2.
210. St. Paul the Apostle, as part of an overarching teaching concerning Christian submission to God’s providence, instructed first century wives to “submit” to their husbands. See Ephesians 5:22. But Paul was not here teaching that husbands were to rule over their wives, much less that wives lose their separate existence in their union with their husbands—rather, Paul taught that all Christians ought to exhibit submission within the cultural situations in which they find themselves. Paul applied a similar teaching to the slave/master and citizen/ruler relationships. In doing so, Paul was not approving the status quo. Rather, he was exhorting Christians to a norm of meek submission to the cultural status quo. See generally Louis W. Hensler III, Misguided Christian Attempts to Serve God Using the Fear of Man, 17 Regent U. L. Rev. 31, 46-50 (2004).
211. Tyler, supra note 153, at 312.
the unity of husband and wife, "the disability of a married woman [was] almost entire."\textsuperscript{212} This conception of marriage could be cruel and oppressive, and was properly rejected by Anglo-American society and by the \textit{Trammel} Court.\textsuperscript{213} But while the consolidation view of marriage also involves some disabilities for the participants, those disabilities are not cruel and oppressive—they are bilateral and arise from the very nature of the marriage relationship.\textsuperscript{214} Among them, for example, was the inability of husband and wife to contract with each other.\textsuperscript{215} The law of spousal privilege also belong to this category.

\textit{(b) Coke's View Does Not Demean Women}

The \textit{Trammel} Court's explanation of the supposedly eroded foundation of the spousal privilege misses the mark in at least two ways. First, the privilege was never based on the concept of woman as chattel—no ancient evidence authority remotely suggests any such idea.\textsuperscript{216} Rather, the spousal testimonial privilege is based on the biblical concept of marriage as two souls in one flesh.\textsuperscript{217} A proper understanding of this idea has not led to the demeaning treatment of women as second-class citizens or worse. To the contrary, the Christian view of marriage, which is based on the earlier Jewish concept, has always led to the elevation of the status of women. Before the teachings of Christianity became widespread, husbands in the Roman Empire could divorce their wives freely,\textsuperscript{218} but the

\begin{flushleft}
\textsuperscript{212} \textsc{Parsons, supra} note 164, at 283.
\textsuperscript{213} \textsc{Tyler, supra} note 153, at 314.
\textsuperscript{214} \textit{Id.} at 320.
\textsuperscript{215} \textit{Id.} at 312.
\textsuperscript{216} By this I do not mean to suggest that no legal authorities appeared to adopt the merger view of marriage—they did. For example, Blackstone apparently adopted the merger view: "By marriage, ... the very being or legal exist[ence] of the woman is [s]till[s]pend during the marriage, or at lea[s]t it is incorporat[ed] ... into that of the husband ..." \textsc{Blackstone, supra} note 71, at 430. My point is that nowhere is this view of marriage crucial to the policy underlying the spousal testimonial privilege. Quite the contrary, the oldest authorities providing the underlying rationale for the privilege fit better with the consolidation model of marriage.
\textsuperscript{217} \textit{See supra} Part II.A.2.b.
\textsuperscript{218} \textsc{Cf. Richard A. Posner, The Problematics of Moral and Legal Theory} 58 (1999) (noting that in ancient Rome moral issues were raised because a man could divorce his wife on any whim).
\end{flushleft}
teachings of Jesus opposed this practice. In Ransom Tyler's late nineteenth-century commentary on various American family law concepts, he noted that

In all heathen nations woman is the ignorant slave or the degraded plaything of the man, regarded by him as fit only for the lowest drudgeries, and to minister to his sensual passions and pleasures. In Christian nations she is the companion of man, and considered his equal; and, in many of the States, she is recognized as being in every respect worthy to share with man the highest culture, and to enjoy equally with him the rights of property.

Second, the Court's suggestion that the ancient foundation of the spousal privilege "demeans [the woman] by denial of separate legal identity" fails because neither the privilege nor its true foundation distinguishes between the male and female spouse. The privilege is based on the ancient concept of two souls in one flesh—the idea that when a man and woman marry, they both lose their purely separate identities and become a new unitary, married entity. If this privilege demeans anyone by the denial of a separate legal existence, then it demeans both the husband and wife. Of course, the Court never has undertaken to demonstrate that the traditional one-flesh view of marriage demeans the spouses, and such an idea is at odds with the thinking of those who have accepted the one-flesh idea through the millennia and still accept it today.

219. See discussion supra notes 161-162, 169 and accompanying text.
220. TYLER, supra note 153, at 311.
222. See supra Part II.A.2.a-c.
B. The Continuing Vitality of the "Consolidation" Conception of Companionate Marriage

1. Marriage and Natural Law

In at least one sense, the idea that a husband and wife engaged in a sexual union are one flesh is literally true. Each is a separate part of a greater offspring-producing organism. John Finnis put it this way:

The union of the reproductive organs of husband and wife really unites them biologically (and their biological reality is part of, not merely an instrument of, their personal reality). Reproduction is one function and so, in respect of that function, the spouses are indeed one reality, and their sexual union therefore can actualize and allow them to experience their real common good—their marriage with the two goods, parenthood and friendship, which are the parts of its wholeness . . . . 223

Senator Jim Bunning must have meant something like this when he declared during the debate on the Federal Marriage Amendment that “[o]nly a man and a woman have the ability to create children. It is the law of nature.”224

But, as the above quotation from Finnis suggests, adherents to the one-flesh view of marriage accept more than the mere literal truth that a man and woman together form a naturally productive organism that neither can form without the other. Adherents to the one-flesh view of marriage believe that a man and woman are naturally created for each other and reach their full human potential only when they lose their mean separate existence into the greater existence within a marriage. Both man and woman are specially designed to meet the needs of each other. Both are, in some sense, incomplete without the other: “Though a male and a female are complete individuals with

respect to other functions—for example, nutrition, sensation, and locomotion—with respect to reproduction they are only potential parts of a mated pair, which is the complete organism capable of reproducing sexually.” Christian philosopher J. Budziszewski put it this way:

The sexes are designed to complement each other. Short of a divine provision for people called to celibacy, there is something missing in the man, which must be provided by the woman, and something missing in the woman, which must be provided by the man. By themselves, each one is incomplete; to be whole, they must be united.

Note that while natural law apologists for the one-flesh view of marriage generally believe that man and woman come together to form a whole because God created them to complement each other, one need not accept special creation to understand the special harmony of man and woman. Judge Richard Posner has developed an elaborate natural explanation for the harmony of the sexes. Posner suggests that natural selection has created, not only “the obvious physical differences” between male and female (“such as in hips and breasts) that are in addition to the differences between the male and female sex organs themselves,” but also “inherent psychological differences between the average man and the average woman, differences with respect to aggressiveness, competitiveness, the propensity to take risks, and the propensity to resort to

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227. See POSNER, supra note 107, at 88-98.
228. POSNER, MORAL AND LEGAL THEORY, supra note 218, at 167.
229. See POSNER, supra note 107, at 93.
violence.”\textsuperscript{230} Posner theorizes that “the female’s primary role in child care may result in a selection in favor of females who are nurturing and loyal, while the male’s primary role in hunting and fighting may result in a selection in favor or males who are bold and aggressive.”\textsuperscript{231}

Whether by design or by natural selection, people in our society seem to know intuitively that there is something special about the husband-wife relationship. Even Wigmore, who wrote in opposition to the disqualification, confessed a “natural repugnance in every fair-minded person to compelling a wife or husband to be the means of the other’s condemnation and to compelling the culprit to the humiliation of being condemned by the words of his intimate life partner,”\textsuperscript{232} but Wigmore dismissed this feeling as “not more than a sentiment”\textsuperscript{233} and equated it with the “spirit of sportsmanship.”\textsuperscript{234} The natural repugnance felt but resisted by Wigmore was articulated more sympathetically in the mid-nineteenth century by the Supreme Court in \textit{Stein v. Bowman}:

Can the wife, under such circumstances, either voluntarily, be permitted, or by force of authority be compelled to state facts in evidence, which render infamous the character of her husband. We think, most clearly, that she cannot be. Public policy and established principles forbid it. This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities


\textsuperscript{231} \textit{Posner, Moral and Legal Theory, supra} note 218, at 93 (footnotes omitted).

\textsuperscript{232} \textit{Wigmore, supra} note 98.

\textsuperscript{233} \textit{Id.}

\textsuperscript{234} \textit{Id.}
of husband and wife, would be to destroy the best solace of human existence.\textsuperscript{235}

2. The Concept of Spousal Unity Continues to Command a Strong Following

The modern authorities reject, with a dismissive wave, the view of marriage that prevailed for thousands of years, and that still is widely held today—that a man and woman do, in a real sense, give up their purely separate existences and become a new unified marital whole that is greater than the sum of the former parts. But this widely-accepted common sense idea has not been and cannot be exterminated by the mere scorn of commentators. The essential unity of husband and wife is too deeply engrained in Anglo-American culture—men still think and speak of their wives as their “better half.” This fact was recognized in a student law review note written more than fifty years ago, in which the author saw through the pronouncements of Bentham, Wigmore and the rest:

\[\text{[T]he critic]tizing commentators tend to overlook one elementary fact, however. The specific purpose and result of a marriage is to combine the resources and to realize the interests of the spouses. Anyone who has observed a single individual refer to himself as “I” before marriage and in the same situations as “we” after marriage understands this. Spouses think of themselves as “we” as against the rest of the world. There is a marital “unity,” and this marital unity is not only mystical, but factual.}\textsuperscript{236}

A more cautious embrace of spousal unity can be seen in a 1995 article written by Milton Regan.\textsuperscript{237} Regan describes two “moments” in marriage – an “external” stance and an “internal” stance. The “external” stance “represents an individual’s capacity to reflect

\textsuperscript{235} Stein v. Bowman, 38 U.S. 209, 223 (1839).
\textsuperscript{237} Regan, supra note 18.
critically upon, rather than simply identify with, her commitments and attachments.”\textsuperscript{238} But Regan contends that the external stance “is insufficient by itself to ensure full enjoyment of the distinctive good that marriage can provide.”\textsuperscript{239} The internal stance also is important:

From the internal stance, marriage appears as a universe of shared meaning that serves as the taken-for-granted background for individual conduct. At this moment, a spouse stands “inside” the marriage as a participant who accepts its claims, not “outside” it as an observer who calls those claims into question.\textsuperscript{240}

The “external stance implicates concepts such as justice, contract and consent . . . .”\textsuperscript{241} The internal stance includes concepts such as “personal attachments,” “blurring the boundary between self and other,” “trust,” and “interdependence.”\textsuperscript{242} Regan almost fearfully suggests that “there is at least a plausible claim that the benefits of using the adverse testimony privilege to express the importance of the internal stance toward marriage outweigh the disadvantages of doing so.”\textsuperscript{243} While Regan is thus extremely tentative, in the present academic climate, it is extremely courageous to say anything on behalf of spousal testimonial privilege. His article is insightful. The external stance perhaps is becoming the dominant view of marriage today, at least in practice, with everyone constantly clinging to his individual existence and evaluating whether the relationship continues to be worthwhile.\textsuperscript{244} There is no spousal unity to the external stance—this is marriage as bare contract. But I believe that most of us still want something more than the external stance. We want the internal stance, which looks like what I have been calling

\textsuperscript{238} Id. at 2049.
\textsuperscript{239} Id.
\textsuperscript{240} Id.
\textsuperscript{241} Id. at 2083.
\textsuperscript{242} Id. at 2083-86.
\textsuperscript{243} Regan, supra note 18, at 2153.
\textsuperscript{244} See generally id. at 2050 (“the external stance towards marriage seems to be gaining influence . . . .”).
the consolidation view of marriage. Each marriage partner loses him or herself in a greater whole. It was the internal stance or consolidation view of marriage that Jerry Maguire finally came to understand and about which the *Trammel* Court did not have a clue.

CONCLUSION

The ambition of this essay is modest in the extreme. I do not argue that *Trammel* was wrongly-decided. I do not argue that wives should not be allowed to testify against their husbands over their husbands’ objections. I merely contend that before the *Trammel* Court rejected a doctrine that had prevailed for centuries, it should at least have analyzed whether our society’s commitment to the essential unity of husband and wife dictates that wives should not testify against their husbands over their husband’s objections. The Court never honestly addressed this question. Instead, the Court rejected the “wife as chattel” straw man. In this day, when the nature and value of marriage is being questioned as it never has before, it might be worthwhile to spend some time thinking about spousal testimonial privilege and whether the direction in which the privilege has been heading over the last few decades is really the direction in which we want to go.