“Every Spouse’s Evidence”: Availability of the Adverse Spousal Testimonial Privilege in Federal Civil Trials

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For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man’s evidence.¹

In 1977, after eight years resisting governmental interrogatories concerning her husband’s “allegedly questionable dealings” with a Swiss bank, Helene Ryan lost her appeal to the Seventh Circuit regarding her invocation of the adverse spousal testimonial privilege.² The Commissioner of Internal Revenue had argued that the privilege was unavailable in federal civil trials, being restricted to criminal proceedings.³ The Ryans had argued the privilege was available.⁴ Although the court declined to establish a rule limiting the application of the privilege to federal criminal proceedings, it denied the availability of the privilege in the case at bar.⁵

Of the two spousal testimonial privileges recognized under Federal Rule of Evidence (“FRE”) 501, the adverse spousal testimonial privilege, also known as the anti-marital facts privilege, is the broader.⁶ Had she prevailed, Helene Ryan could have refused to testify to anything adverse to her husband’s interest without fear of sanction from the court. The other spousal privilege recognized under FRE 501, the

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¹ *United States v Bryan*, 339 US 323, 331 (1950).

² *Ryan v Commissioner of Internal Revenue*, 568 F2d 531, 535 (7th Cir 1977) (affirming the Tax Court’s rejection of the adverse spousal testimony privilege under the factual circumstances of the case).

³ *Id* at 543 (“As further support for overruling the Ryans’ claim of marital privilege, the Commissioner argues that with rare exceptions, the privilege is only recognized in criminal cases”).

⁴ *Id* at 544 (noting the Ryans’ argument that Congress “expressly preserved the marital privilege in civil cases”).

⁵ *Id* (stating that “it is not necessary to fully defend the civil-criminal distinction in order to reject the marital privilege in this case”).

⁶ Joseph M. McLaughlin, *Weinstein’s Federal Evidence* § 505.03 at 505-6 (Lexis 2d ed 2001) (noting that the adverse spousal testimonial privilege “applies to testimony against a spouse on any subject, including non-confidential matters and matters that occurred prior to the marriage,” but the spousal confidential communications privilege allows a spouse to refuse to testify only as to the confidential communications made during the marriage).

confidential communications privilege, applies only to confidences exchanged between spouses and only if those confidences have remained confidential.⁷ The adverse testimonial privilege, however, applies to any testimony that might be considered adverse to the interests of the spouse.⁸

Different policy grounds underlie the two privileges. The confidential communications privilege finds its policy justifications in the same policies that underlie, for example, priest-penitent or doctor-patient privileges. The anti-marital facts privilege, on the other hand, finds its justifications in the protection of marriage. Perhaps because the two privileges are based on different policy grounds, judicial understandings of the appropriate scope of the privileges differ sharply. While the confidential communications privilege unquestionably applies in both criminal and civil proceedings, the availability of the adverse testimonial privilege in civil proceedings is contested.

Very little case law exists on the applicability of the spousal testimonial privilege in federal civil trials. What little exists articulates no clear rule,⁹ nor does it offer any coherent normative justification for expanding or restricting the privilege's scope.¹⁰ Legally, the question remains unsettled. Nonetheless, most courts and commentators assume that the privilege only applies in federal criminal trials.¹¹ But there is no exclusion of the privilege from civil trials in the rule itself—FRE 501 explicitly applies in all federal civil matters in which state law does not provide the rules of decision.¹² In theory, according to the language of the Rule, the spousal testimonial privilege should apply in federal civil cases.¹³

⁷ Id § 505.09 at 505-13 ("The confidential marital communications privilege prohibits one spouse from testifying as to conversations or communications with the other spouse made in confidence during their marriage.").

⁸ Id § 505.03 at 505-6. See note 6.

⁹ See Part I.B.

¹⁰ See Part II.

¹¹ See, for example, Michael H. Graham, 1 *Handbook of Federal Evidence* § 505.1 at 715 (West 5th ed 2001) ("The anti-marital facts testimonial privilege is inapplicable in civil cases where federal law provides the rule of decision."), citing *Ryan*, 568 F2d at 544. See also McLaughlin, *Weinstein's Federal Evidence* § 505.04 at 505-8 (cited in note 6) ("Most formulations of the privilege expressly limit its application to criminal proceedings."); Christopher B. Mueller and Laird C. Kirkpatrick, *Federal Evidence* § 206 at 426 (Lawyers Coop 1994) (noting that the testimonial privilege is "normally held to apply only in criminal proceedings where one spouse is a defendant"); Thomas A. Mauet and Warren D. Wolfson, *Trial Evidence* § 8.10 at 259 (Aspen 1997) ("The privilege to bar a spouse's testimony applies only to criminal cases under federal law."). The privilege is available in grand jury proceedings under FRE 1101(d)(2).

¹² See, for example, *International Horizons, Inc v Committee of Unsecured Creditors*, 689 F2d 996, 1003 (11th Cir 1982) (holding that federal privilege law applies in a bankruptcy proceeding).

¹³ See FRE 501:

Except as otherwise required by the Constitution of the United States or provided by Act

This Comment takes a two-fold approach to answering the question of the privilege's federal civil application.¹⁴ First, the Comment asks whether legal precedent establishes a criminal-civil distinction for the availability of the privilege. Second, because of the evolving nature of evidentiary privileges "in the light of reason and experience,"¹⁵ the Comment asks whether the privilege should apply in civil proceedings on a going-forward basis. Part I discusses the current state of the law of marital testimonial privilege and the split in the federal courts on the applicability of the privilege to federal civil cases. Part II explores the justifications for the privilege and how those justifications translate to a federal civil context. Part III looks at broader privilege doctrine, including the Fifth Amendment, all of which supports at least some civil context for the marital testimonial privilege. Part IV suggests that the nature of privilege law requires the anti-marital facts privilege to be available in certain civil proceedings.

I. CURRENT STATE OF THE SPOUSAL TESTIMONIAL PRIVILEGE

A. The Adverse Spousal Testimonial Privilege

Recognized in common law and thus under FRE 501, the adverse testimonial privilege allows one spouse to refuse to testify against the other spouse without sanction from the court.¹⁶ The privilege sweeps broadly: a spouse may refuse any adverse testimony, including testimony about conversations or actions undertaken with third parties.¹⁷

of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

¹⁴ This Comment assumes the ongoing validity of the spousal testimonial privilege. Many commentators call for abolishing it altogether. See, for example, David Medine, *The Adverse Testimony Privilege: Time to Dispose of a "Sentimental Relic"*, 67 Or L Rev 519, 556 (1988) (suggesting that "the adverse testimony privilege be abandoned completely"). This Comment will not engage in a normative discussion of whether the privilege should apply at all, but instead ask whether the privilege does, and should, apply in federal civil cases, given its recognized and continuing application in federal criminal proceedings.

¹⁵ FRE 501.

¹⁶ *Ryan v Commissioner of Internal Revenue*, 568 F2d 531, 542 (7th Cir 1977) (explaining that the privilege "permits each spouse to preclude the adverse testimony of the other and sometimes also permits each spouse to decline to testify against the other"). By far, the majority of spouses claiming the privilege are wives in favor of their defendant-husbands. See Richard O. Lempert, *A Right to Every Woman's Evidence*, 66 Iowa L Rev 725, 727-28 (1981) (noting that, of the hundreds of cases he reviewed, only a handful involved husbands testifying against their wives). Therefore, this Comment will refer to the witness-spouse as "she" or "the wife," and the defendant-spouse as "he" or "the husband," purely for the sake of convenience.

¹⁷ See *Trammel v United States*, 445 US 40, 51-53 (1980) (explaining that the privilege is invoked to exclude "communications made in the presence of third persons," but limiting the privilege to the witness-spouse alone); Michael W. Mullane, *Trammel v. United States: Bad History, Bad Policy, and Bad Law*, 47 Me L Rev 105, 108 (1995) (stating that the spouse's privilege protects all adverse testimony during the marriage).

Originally the rule combined spousal incompetence to testify for or against one another with a prohibition on any such voluntary testimony by either spouse.¹⁸ Later Supreme Court decisions rejected the incompetence rule but left in place the privilege, allowing either spouse to exclude adverse testimony by the other, or to refuse to testify at all.¹⁹

As a threshold matter, the testimony sought must be adverse to the legal interests of the witness's spouse.²⁰ The Supreme Court has declared that the evidentiary privileges should be narrowly construed because they block the fact-finding process and derogate the search for truth.²¹ Thus courts will not grant the privilege in cases of "sham" marriages undertaken for purposes of fraud.²² The privilege also will not apply in cases of crimes by one spouse against the other spouse²³ or the spouse's children.²⁴

Originally, the privilege could be asserted by either (1) a spouse hoping to prevent the other spouse from testifying adversely, or (2) a spouse refusing to testify as a witness against the other spouse.²⁵ In

¹⁸ *Stein v Bowman*, 38 US 209, 223 (1839) (forbidding a wife to testify regarding her deceased husband's alleged perjury in a dispute about an estate). See *Hawkins v United States*, 358 US 74, 75 (1958) (explaining that the common law rule that "husband and wife were incompetent as witnesses for or against each other" forbade testimony even if the spouses so desired).

¹⁹ *Funk v United States*, 290 US 371, 380-81 (1933) (stating that the prevention of a spouse's testimony because of her incompetence as an interested party was an outdated and incongruous rule).

²⁰ See *United States v Van Cauwenberghe*, 827 F2d 424, 431-32 (9th Cir 1987) (noting that the privilege is not a blanket privilege, but only available where the testimony would be adverse); *In re Martenson*, 779 F2d 461, 463 (8th Cir 1985) ("We have previously refused to recognize the privilege as to questions eliciting only objective facts reflecting no illegal activity by anyone.").

²¹ *United States v Nixon*, 418 US 683, 710 (1974) ("Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

²² See *In re Grand Jury Empanelled October 18, 1979 Witness (Maltifano)*, 633 F2d 276, 278 (3d Cir 1980) (noting that courts must sometimes inquire into the validity of a marriage to determine whether the spouses deserve the privilege based on the marriage). The "sham" may be for the purposes of fraud on the court, or fraud against laws of the United States. *Lutwak v United States*, 344 US 604, 614-15 (1953) (finding that since a World War II veteran married solely to bring his wife into the United States under the War Brides Act, the "rule prohibiting antispousal testimony has no application"). See also *United States v Saniti*, 604 F2d 603, 604 (9th Cir 1979) (finding a wife's testimony against her husband properly admitted when an evidentiary hearing resulted in a finding of fact that the marriage took place solely so that the privilege might be invoked).

²³ *Herman v United States*, 220 F2d 219, 226 (4th Cir 1955) (permitting a wife to testify against her husband in cases of personal injury to her or where the crime affects her property, as in this case, in which the husband was charged with theft of the wife's money and jewelry).

²⁴ *United States v Allery*, 526 F2d 1362, 1367 (8th Cir 1975) (permitting the testimony of a wife against her husband, who was charged with raping her daughter).

²⁵ See Part II.B.

1980, the Supreme Court vested the privilege solely in the latter, the witness-spouse.²⁶

The spousal testimonial privilege rests on justifications quite different from those supporting the confidential communications privileges under FRE 501. The confidential communications privileges protect the free flow of communication between parties to certain professional relationships that rely on those communications.²⁷ The law assumes that the confidences would not be made unless the communications remain confidential, and therefore that compelled testimony would harm those relationships—priest-penitent, doctor-patient, attorney-client.²⁸ The adverse spousal testimonial privilege also exists to preserve a marriage relationship from harm, but the policy justifying it focuses on whether compelled testimony will harm the marriage on a going-forward basis, regardless of whether the testimonial information was received in confidence.²⁹

B. Federal Decisions on the Spousal Testimonial Privilege

1. Supreme Court jurisprudence.

No case on the criminal-civil divide in the application of the marital privilege has yet reached the Supreme Court. Those marital privilege questions on which the Court has ruled are, with one exception,³⁰ collateral appeals to criminal proceedings and do not speak to the applicability of the privilege in federal civil cases.³¹ Nonetheless, these

²⁶ *Trammel*, 445 US at 53 (modifying the privilege to balance the interests of marital harmony and “legitimate law enforcement needs”).

²⁷ See John W. Strong, *McCormick on Evidence* § 72 at 115 (West 5th ed 1999) (stating that the protections afforded to lawyers, doctors, and clergy are granted because of this utilitarian justification). The confidential communications privilege also exists for marriages. See id § 78 at 126–27 (discussing a historic basis for the marital confidential communications privilege).

²⁸ England codified a confidential communications privilege between spouses in 1853: “No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.” Evidence Amendment Act, 1853, 16817 Vict, Ch 83, § 3. See also Strong, *McCormick on Evidence* § 78 at 126–27 (cited in note 27) (stating that the Evidence Amendment Act of 1853 accomplished the reform of disqualifying the testimony of spouses). The policy justifications for the spousal confidential communications privilege in American law are much the same as for the others: the privilege is needed to encourage marital confidences, which in turn promotes marital harmony. See id § 72 at 115 (comparing the relationships between doctor-patient and husband-wife to justify the privilege based on the “essential privacy of certain significant human relationships”).

²⁹ Justifications for the privilege are taken up in greater detail in Part III.

³⁰ *Stein v Bowman*, 38 US 209, 223 (1839) (holding that a wife could not testify to her deceased husband’s perjury in the appeal of a dispute over the lawful heir to an estate).

³¹ Those cases are *Trammel v United States*, 445 US 40, 42 (1980) (regarding allegations against a husband for drug-related criminal activity); *Hawkins v United States*, 358 US 74, 75 (1958) (regarding a criminal trial for violations of the Mann Act for transporting a girl across state lines for immoral purposes); *Funk v United States*, 290 US 371, 373 (1933) (involving a criminal trial for conspiracy to violate the prohibition law); *Jin Fuey Moy v United States*, 254 US

cases have value for this issue in two respects. First, the cases discuss at length the justifications for the privilege, and second, dicta at least suggest Supreme Court positions on the civil-criminal distinction.

Two statements from Supreme Court cases on the spousal testimonial privilege suggest a criminal-civil distinction. In its discussion of the privilege's history, the Court wrote in *Hawkins v United States*,³² "the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake."³³ In *Trammel v United States*,³⁴ the Court noted that "[t]he *Hawkins* privilege is invoked . . . to exclude evidence of *criminal acts*" and not to protect private information between husband and wife.³⁵ These statements appear to support some restriction of the privilege to criminal cases. A lower court might consider the *Trammel* statement an absolute bar to civil application, but in fact the *Hawkins* court came closest to stating a rule: courts will apply the privilege where "life or liberty" is at stake.³⁶

Without an explicit statement from the Supreme Court on the anti-marital facts privilege, lower courts have split on the privilege's scope. Standing alone, the Seventh Circuit has strongly endorsed a case-by-case evaluation of the privilege.³⁷ Among other federal courts, three identifiable lines of interpretation have emerged: a blanket denial of the privilege in civil proceedings,³⁸ a blanket application in civil

189, 195 (1920) (declaring a wife incompetent to testify on behalf of her husband in a criminal trial for violations of the Harrison Anti-Narcotic Act).

³² 358 US 74 (1958).

³³ *Id.* at 77 (emphasis added).

³⁴ 445 US 40 (1980).

³⁵ *Id.* at 51 (emphasis added). Curiously, Justice Burger's opinion implies that the evidentiary privileges only apply in criminal cases: "The Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges in *federal criminal trials* ' . . . in the light of reason and experience.'" *Id.* at 47 (quoting FRE 501) (emphasis added). But the Rule itself states explicitly that the FRE apply to any proceeding in which state law does not supply the rule of decision. FRE 501. Justice Burger's statement here may suggest that he unconsciously restricted his reasoning to the type of case in front of the Court—a criminal case. If this supposition is true, Justice Burger's statement "limiting" the privilege to federal criminal cases did not, in fact, limit it, unless we are to believe that Justice Burger also limited the FRE to federal criminal cases generally.

³⁶ At least one case from an earlier court suggests a commonly understood distinction between cases where "life and liberty" are at stake and cases that are purely civil in nature. The case explicitly distinguished "life or liberty" from the constitutional protections offered corporations. As corporations have no life or liberty to protect, they may claim only protection against deprivation of property. *Railroad Tax Cases*, 13 F 722, 746-47 (Cir Ct D Cal 1882) (finding that a California statute disallowing a corporation to deduct the value of its mortgages while other persons were permitted to do so violated the Fourteenth Amendment). Neither the *Railroad Tax Cases* nor *Hawkins*, however, explicitly tie the privilege in question to "criminal" proceedings.

³⁷ *Ryan v Commissioner of Internal Revenue*, 568 F2d 531, 543 (7th Cir 1977) (stating that "it is important to decide whether the privilege is applicable taking into account the particular factual circumstances" of each case).

³⁸ See *Engelmann v National Broadcasting Co, Inc*, 1995 US Dist LEXIS 4725, *5 (S D NY) (granting a motion to compel the testimony of defendant's spouse, who had claimed the

and criminal proceedings without restriction,³⁹ and a limited application in civil proceedings ancillary to criminal trials.⁴⁰

2. *Ryan*: a case-by-case approach.

In *Ryan v Commissioner of Internal Revenue*,⁴¹ the Seventh Circuit declined to establish a general rule limiting the privilege to criminal cases.⁴² The court rejected the applicability of the privilege in the tax deficiency case at bar on the grounds that the motivating principle behind the privilege—the fostering of marriage—did not apply.⁴³ The Ryans had been married for forty years and did not contend that recognition of the privilege was necessary to protect their marriage.⁴⁴ The court also stated that the government's grant of immunity in response to the Ryans' Fifth Amendment claims diminished the "actual harm which one Ryan's testimony would unleash upon the other."⁴⁵

The particularly unusual element in *Ryan* concerned the court's balancing test for recognition of the privilege, "the need for truth against the importance of the relationship or policy sought to be furthered by the privilege, and the likelihood that recognition of the privilege will in fact protect that relationship in the factual setting of the case."⁴⁶ Courts normally do not apply the testimonial privileges on a case-specific basis; like any other law, once a privilege is recognized, courts apply it globally and do not waive a privilege because the information it protects is particularly important to the case at hand.⁴⁷ The Seventh Circuit, however, stressed the importance of deciding the privilege's applicability "taking into account the particular factual cir-

privilege in an employment discrimination action, and stating that "the privilege against adverse spousal testimony[] is only applicable in criminal actions and hence has no bearing on this civil action").

³⁹ See *Gilles v Del Guercio*, 150 F Supp 864, 866 (S D Cal 1957) (overturning a deportation order that was based in part on the testimony of a husband against his Japanese-born wife, and stating that "[t]he rule is that during the . . . marriage, [one spouse] may not be examined against the other") (emphasis omitted).

⁴⁰ See *United States v Sriram*, 2001 US Dist LEXIS 542, *10 (N D Ill) (allowing defendant's spouse to claim the privilege, and finding that "the spousal testimonial privilege would not apply to adverse testimony given by a spouse in a civil proceeding that is untethered to a criminal proceeding").

⁴¹ 568 F2d 531 (1977).

⁴² *Id* at 544 (acknowledging the difficulties inherent in the distinction but noting that "it is not necessary to fully defend the civil-criminal distinction in order to reject the marital privilege in this case").

⁴³ *Id* at 543.

⁴⁴ *Id* (explaining that the Ryans did not "realistically . . . contend that recognition of the marital privilege would have been necessary to protect their marriage").

⁴⁵ *Id*.

⁴⁶ *Id*.

⁴⁷ The privileges have the force of common law. See FRE 501. In this respect the privilege rule differs from FRE 807 on hearsay, the "catch-all" exception, where courts may admit hearsay evidence if the interests of justice will be best served thereby.

cumstances of *this case*.”⁴⁸ The *Ryan* case-by-case approach ties the availability of the privilege not to any global recognition by common law, but to the purposes it might serve given the specific facts at hand. This rule is far more flexible than the other evidentiary privilege rules.

3. *Abbott*: the blanket denial.

District courts in the Second⁴⁹ and Seventh⁵⁰ Circuits deny the privilege in federal civil cases altogether. These courts do not engage in any discussion of the rule but simply dismiss its application.

Citing *Ryan* for the proposition that the privilege applies only in criminal cases, *Abbott v Kidder, Peabody & Co*⁵¹ dismissed a claim of spousal testimonial privilege to limit a deposition on the basis that the would-be claimant failed to present any case authority to convince the court to recognize the privilege in a civil case.⁵² *Engelmann v National Broadcasting Co, Inc*⁵³ relied on *Hawkins* as well as *Ryan* for the simple statement that “the privilege against adverse spousal testimony [] is only applicable in criminal actions and hence has no bearing on this civil action.”⁵⁴

Although the Third Circuit has not directly addressed the scope of the privilege, in *In re Grand Jury Empanelled October 18, 1979 Witness (Maltifano)*,⁵⁵ the court stated, “The crux of this privilege is that a person may not be forced to be a witness against his or her spouse in a criminal proceeding.”⁵⁶ The court did not cite any authority for this proposition, using it only as background for its questioning of the Seventh Circuit’s “joint-participants exception” to the spousal testimonial privilege.⁵⁷

⁴⁸ *Ryan*, 568 F2d at 543 (emphasis added).

⁴⁹ *Engelmann v National Broadcasting Co, Inc*, 1995 US Dist LEXIS 4725, *5 (S D NY).

⁵⁰ *Abbott v Kidder, Peabody & Co*, 1997 US Dist LEXIS 8500, *12–13 (N D Ill) (stating that the “Seventh Circuit has not recognized any privilege against adverse spousal testimony in any civil case after *Ryan*”).

⁵¹ 1997 US Dist LEXIS 8500 (N D Ill).

⁵² *Id* at *12–13 (rejecting the argument in favor of applying the privilege in the civil case just as the argument was rejected in *Ryan*).

⁵³ 1995 US Dist LEXIS 4725 (S D NY).

⁵⁴ *Id* at *5.

⁵⁵ 633 F2d 276 (3d Cir 1980).

⁵⁶ *Id* at 277.

⁵⁷ *Id* at 278–80 (rejecting a joint-participants exception for the spousal testimonial privilege invoked by a witness in grand jury proceedings). The Supreme Court has not yet resolved a circuit split on the joint-participants exception to the privilege. The Seventh Circuit held in *United States v Van Drunen*, 501 F2d 1393, 1396 (7th Cir 1974), that the privilege is not available where spouses participate in criminal action: “We think that goal [of preserving the marriage] does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that . . . he is creating another potential witness.” The Second and Third Circuits have held that the privilege applies regardless of joint participation. *In re Grand Jury Subpoena*, 755 F2d 1022, 1026 (2d Cir 1985) (“We also are unable to accept the proposition that a marriage

4. *Gilles*: the blanket application.

In *Gilles v Del Guercio*,⁵⁸ a Ninth Circuit district court applied the spousal privilege to a federal civil proceeding without qualification.⁵⁹ A merchant marine officer, having met and married a Japanese woman while posted in Japan, tried to have her deported from the United States by claiming she had engaged in prostitution before entering the country.⁶⁰ Mrs. Gilles appealed the INS deportation order on the basis of her husband's testimony against her, the lack of opportunity given for counsel to cross-examine her husband, the denial of any right to call character witnesses, and the entrance into evidence of a written statement she had made without the aid of an interpreter.⁶¹ The court held for Mrs. Gilles on every point: "[These violations] deprived this alien of the essential elements of due process of law, and rendered the hearing so unfair and unjust that the findings and order of deportation cannot be sustained."⁶² Judge Byrne stated the privilege rule in absolute terms and did not qualify it or draw a civil-criminal distinction: "The rule is that during the existence of the marriage, the husband or wife may not be examined against the other as to any matter . . . regardless of whether it relates to a matter occurring during or prior to the marriage."⁶³

The testimonial privilege played a comparatively minor role in the court's holding. The due process violations would have ensured that the INS's decision was overturned, regardless of whether the court excluded Mr. Gilles's testimony under the testimonial privilege. The facts of this case—the egregious bad faith of Mr. Gilles and the collusion of the INS officer—seemed to drive the rule. Perhaps because of the specific fact-driven nature of the *Gilles* rule, later cases have not followed it.⁶⁴

cannot be a devoted one simply because at some time the partners have decided to engage in a criminal activity."), vacd, 475 US 133 (1986) (remanding to the Southern District of New York with instructions to dismiss the cause as moot); *Maltifano*, 633 F2d at 278 ("We fail to see how the source of that instability . . . makes any difference in applying the privilege. We are aware of no public policy requiring that a marriage be dissolved when the partners engage in crime.").

⁵⁸ 150 F Supp 864 (S D Cal 1957).

⁵⁹ *Id* at 865 (applying the privilege in the appeal of a deportation hearing).

⁶⁰ *Id* at 865.

⁶¹ *Id*.

⁶² *Id* at 867.

⁶³ *Id* at 866 (emphasis omitted).

⁶⁴ *Gilles* is cited only to be dismissed. See, for example, *Ryan v Commissioner of Internal Revenue*, 67 Tax Ct 212, 219 n 5 (1976) ("We are aware that the privilege was recognized in *Gilles*, a civil deportation case . . . , [and] we [do not] believe [it] suffices to warrant recognition of the testimonial privilege herein."). One curious case does not cite *Gilles* but strongly implies the privilege may be claimed in federal civil proceedings. *Fallowfield Development Corp v Strunk*, 1990 US Dist LEXIS 4805 (E D Pa), concerned a civil action arising under the Comprehensive Environmental Response Compensation and Liability Act of 1980. The court denied Mrs. Strunk's claim of privilege not on the grounds that the privilege is unavailable in civil cases, but

5. *Yerardi* and *Sriram*: limited application in civil proceedings
“tethered” to criminal trials.

The First Circuit discussed but declined to establish a rule on the civil-criminal distinction in *United States v Yerardi*,⁶⁵ because the spouse claimed the privilege in a criminal forfeiture proceeding.⁶⁶ The government had argued that the adverse spousal testimonial privilege only applied in criminal proceedings.⁶⁷ The privilege could not apply in a criminal forfeiture proceeding, according to the government, because it was “more civil than criminal,” affecting only a property interest.⁶⁸ Judge Boudin, writing for the court, pointed out that there is no identifiable rule on the scope of the privilege: “[S]ome formulations of the privilege, and dicta in some of the cases, assume that [it] could never be asserted in a civil case. Interestingly, it is hard to find a square holding to this effect.”⁶⁹ The judge further noted that even if the privilege were so restricted, certain cases could test that assumption, for example, a government civil fraud case where a criminal prosecution might follow.⁷⁰ Regardless, Mrs. Yerardi asserted the privilege in a proceeding ancillary to a criminal case, and the testimony sought contained some risk of contributing to a future criminal prosecution of Mr. Yerardi; therefore, the privilege applied.⁷¹

The Northern District of Illinois, in *United States v Sriram*,⁷² permitted a limited application of the privilege in a civil proceeding tied to a criminal prosecution.⁷³ The court confronted head-on the question

that, given Mr. Strunk’s irreparable brain damage following a stroke, any adverse testimony from Mrs. Strunk would not affect their marital relationship. *Id.* at *8–10. The court refused to apply the privilege because of the specific facts of the case, but stated that “a federal common law privilege exists whereby one spouse may refuse to testify adversely against the other.” *Id.* at 8. After dismissing Mrs. Strunk’s claim, the court noted, “Because this Court finds that the privilege . . . does not apply because its underlying purpose would not be furthered, this Court need not reach plaintiffs [sic] claim that the privilege only exists in criminal cases and not civil cases.” *Id.* at 11 n 7. Nonetheless, the court’s analysis up to this point had proceeded on the assumption that Mrs. Strunk had a right to claim the privilege—otherwise the court would not have had to address the rule’s underlying purpose at all.

⁶⁵ 192 F3d 14 (1st Cir 1999).

⁶⁶ *Id.* at 19 (stating that the court did not need to rule on the civil-criminal issue because the proceeding was “ancillary to a criminal case”).

⁶⁷ *Id.* at 18–19.

⁶⁸ *Id.*

⁶⁹ *Id.* at 19.

⁷⁰ *Id.*

⁷¹ *Id.* at 21–22 (“[T]he connection between the government’s criminal forfeiture proceeding . . . and the possible prosecution . . . is close enough that the privilege may be asserted in the forfeiture proceeding.”). Though the judge did not state it, presumably his hypothetical would test the restriction because of the Fifth Amendment implications and the likelihood that the civil fraud testimony would be admitted in the later criminal proceeding.

⁷² 2001 US Dist LEXIS 542 (N D Ill).

⁷³ *Id.* at *11–12 (allowing Ms. Sriram to invoke the privilege for any sought testimony that “might be used adversely by the Government in the pending criminal proceeding”).

of whether the privilege applied in a civil action for injunctive relief and damages, brought by the government parallel to a criminal proceeding on an indictment for mail fraud and health care fraud.⁷⁴ Ms. Sriram claimed the testimonial privilege when the government indicated it would subpoena her as a witness against her husband, and offered no assurance that her testimony would not be used in criminal proceedings against Dr. Sriram or herself.⁷⁵

After briefly discussing *Ryan*, the court balanced the privilege's costs and the judicial trend towards restricting rather than expanding the privilege over the past seventy years against the interest of avoiding marital discord.⁷⁶ Though noting that "it is difficult to say that the privilege would serve the interest of avoiding marital discord in criminal cases but not in civil cases," the court held that the balance of factors led to the conclusion that the privilege "would not apply to adverse testimony given by a spouse in a civil proceeding that is untethered to a criminal proceeding."⁷⁷ Because the government had not given immunity or any assurance that the compelled testimony would not be used in the parallel criminal proceeding, the court upheld Ms. Sriram's claim.⁷⁸

6. Clarifying the federal holdings.

Supreme Court guidance on the privilege's criminal-civil divide is tenuous at best, and lower courts are split on the applicability of the privilege in federal civil cases. Those cases asserting a blanket denial of the privilege in civil proceedings rely on *Ryan* and *Hawkins*, but neither establishes a civil-criminal distinction. *Ryan* denies the privilege, but suggests a unique case-by-case evaluation at odds with the global application of privilege law in general.⁷⁹ The strongest case for the blanket denial of the privilege in federal civil cases, then, relies on dicta in *Hawkins* that suggest the law applies the privilege in cases where "life and liberty" are at stake.⁸⁰ Given the facts of *Gilles* and the concerns in *Sriram* and *Yerardi*, however, it is clear that the law does

⁷⁴ *Id.* at *1-2.

⁷⁵ *Id.* at *2-3 ("The Government indicated that it had not provided, and would not provide, any assurance that Ms. Sriram's testimony or its fruits would not be used" either in a criminal hearing against her husband or herself).

⁷⁶ *Id.* at *9 ("[T]he Court must balance [the marital harmony] interest against the costs of the privilege, which . . . are substantial, and the fact that the history of this privilege . . . shows that the trend has been to restrict rather than expand it.").

⁷⁷ *Id.* at *9-10.

⁷⁸ *Id.* at *11 (holding that since "[t]he Government here has not provided such immunity or assurance" that the testimony would not be used in any subsequent criminal hearing, "the spousal testimonial privilege may be asserted in this case").

⁷⁹ *Ryan*, 568 F2d at 543. See text accompanying note 48.

⁸⁰ *Hawkins*, 358 US at 77. See text accompanying note 33.

not tie deprivation or restriction of “life and liberty” solely to criminal cases.

What seems to be a blanket application of the privilege in civil cases, represented by *Gilles*,⁸¹ does not survive close examination. Though the INS deportation hearing qualified as a civil proceeding, the real issue concerned *Hawkins*’s “life or liberty.”⁸² The deportation order would have affected Ms. Gilles’s liberty. The *Gilles* holding is therefore a quasi-criminal application in nature, in the line of cases represented by *Yerardi*.⁸³

In both *Sriram*⁸⁴ and *Yerardi*, one concern with denying the privilege in federal civil cases lies in the possibility that a restriction of scope might have allowed an end run around the privilege rule altogether. The evidence gathered by spousal testimony could have been brought into evidence in any later criminal trial,⁸⁵ or the court might have ruled that the spouses in both cases waived the privilege by testifying in the former civil proceeding.

C. Proposed FRE 505

Courts that deny the applicability of the testimonial privilege in civil cases often rely on Proposed FRE 505,⁸⁶ suggested by the Supreme Court in 1973 in Proposed Article V,⁸⁷ but rejected out of hand by Congress in favor of the current Rule 501.⁸⁸ Proposed Article V recognized nine nonconstitutional evidentiary privileges, explicitly including the spousal testimonial privilege in criminal proceedings but omitting a marital confidential communications privilege altogether.⁸⁹

⁸¹ 150 F Supp at 866. See text accompanying notes 58–63.

⁸² *Hawkins*, 358 US at 77. See text accompanying note 33.

⁸³ 192 F3d 14. See text accompanying notes 65–71.

⁸⁴ 2001 US Dist LEXIS 542. See text accompanying notes 72–78.

⁸⁵ This is Judge Boudin’s concern in *Yerardi*, 192 F3d at 20 (“[A] further criminal prosecution of [the husband] is a realistic possibility, and [the wife’s] answers could contribute to that prosecution.”).

⁸⁶ See, for example, *Ryan*, 568 F2d at 543–44, 544 n 6 (stating that the proposed rule “does provide some guidance in interpreting the scope of privileges under Rule 501”).

⁸⁷ Proposed Article V: Privileges (proposing thirteen rules on privileges including the following: lawyer-client (Proposed Rule 503), psychotherapist-patient (Proposed Rule 504), husband-wife (Proposed Rule 505), and communications to clergy (Proposed Rule 506)).

⁸⁸ FRE 501, Note by Federal Judicial Center (explaining that Congress deleted the “nine non-constitutional privileges and the three general rules proposed by the Court” and replaced them with one rule providing that “the law of privileges . . . be developed by the courts as . . . common law”). See also Strong, *McCormick on Evidence* § 75 at 121 (cited in note 27) (stating that “the privilege provision excited particular controversy, with the result that all of the specific rules of privilege were excised from the finally enacted version of the Rules”).

⁸⁹ FRE 501, Report of House Committee on the Judiciary; Proposed Article V: Privileges; Proposed Rule 505. Parts (a) and (b) of Proposed Rule 505 stated: “(a) General rule of privilege. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him. (b) Who may claim the privilege. The privilege may be claimed by the accused or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of evidence

The Advisory Committee Note to Proposed Rule 505 does not discuss the restriction to criminal cases.⁹⁰ Congress, dissatisfied with the many “controversial modifications or restrictions upon common law privileges” in the Proposed Article, eliminated the Court’s specific privilege rules in favor of a rule explicitly governed by the development of common law.⁹¹

The Advisory Committee Notes to FRE 501 indicate that the House and Senate Judiciary Committees believed the Proposed Rule, permitting federal courts to recognize only those privileges mentioned in the Rule, would have promoted forum shopping for the most favorable privilege law as applied by state or federal courts.⁹² The Seventh Circuit suggests the “more likely source of dissension” was not the limitation of the privilege to federal criminal cases, but the lack of a spousal confidential communications privilege.⁹³ The Proposed Rule includes no discussion concerning the civil-criminal distinction, but it at least offers some indication of the Supreme Court’s position on the limitations of the privilege before the introduction of the current FRE 501. Therefore, in spite of the rejection of Proposed Article V and the lack of discussion about a civil-criminal distinction in the Advisory Committee Notes, federal courts continue to use Proposed Rule 505 for guidance in interpreting the scope of the testimonial privilege.⁹⁴

II. JUSTIFICATIONS FOR THE SPOUSAL TESTIMONIAL PRIVILEGE

The justifications for the spousal testimonial privilege have changed through its development, from the legal fiction of the unified existence of husband and wife in English law to the underlying policy of protecting marriage in American law. This Part will discuss the evolution of the privilege’s underlying justifications.

to the contrary.” See also Strong, *McCormick on Evidence* § 75 at 121 (cited in note 27). The nine non-constitutional privileges included required reports, attorney-client, psychotherapist-patient, husband-wife in criminal proceedings, clergyman-communicant, political vote, trade secrets, secrets of state and other official information, and identity of informer. See Proposed Article V: Privileges.

⁹⁰ Proposed Rule 505, Advisory Committee Note (discussing the evolution of the marital privilege, the varying rules in different jurisdictions, the lack of a confidential communications privilege, and the exceptions in Section (c)).

⁹¹ FRE 501, Report of the Senate Committee on the Judiciary (explaining that Congress decided to leave the law of privileges “in its current condition to be developed by the courts,” and stating that “the husband-wife privilege drew fire as a result of the conscious decision of the Court to narrow its scope from that recognized under present federal decisions”).

⁹² FRE 501, Report of the House Committee on the Judiciary (“[T]he committee considered that the Court’s proposed Article V would have promoted forum shopping in some civil actions, depending upon differences in the privilege law applied as among the state and federal courts.”).

⁹³ *Ryan*, 568 F2d at 544 n 6 (suggesting that the dissension resulted from “the total elimination of the privilege protecting confidential marital communications”).

⁹⁴ *Id.* at 543. See also note 86.

A. Historical Justifications: The English Rule

Wigmore writes that the origin of the testimonial privilege remains “in a tantalizing obscurity.”⁹⁵ The earliest recorded use of the testimonial privilege occurred in 1580, when the Chancery Court declared a wife’s testimony on behalf of her husband admissible, but at the same time upheld the husband’s privilege to keep his wife from testifying against him.⁹⁶ By the seventeenth century the disqualification rule had developed—under this rule, spouses could not testify for or against one another because they were considered to have a single legal existence.⁹⁷

The testimonial privilege as it evolved in the seventeenth century and beyond joined two strands of legal thought. First, an interested party could not testify in litigation, and second, a wife, considered part of a single legal existence with her husband, could not testify for him.⁹⁸ Missing from English common law is any policy-based notion that the privilege protects and preserves marriage. Wigmore, however, suggests the true explanation for spousal disqualification may lie in policy grounds: “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 his roof, [and] shared the secrets of his domestic life.”⁹⁹

In English law there was also confusion over any absolute distinction between civil and criminal applications.¹⁰⁰ A famous case, *Lord Audley’s Case*,¹⁰¹ declared that a wife could not testify against her hus-

⁹⁵ John Henry Wigmore, 8 *Evidence in Trials at Common Law* § 2227 at 211 (McNaughton 1961) (explaining that the precise time of its origin is unknown, “as well as the process of thought by which it was reached”).

⁹⁶ *Bent v Allot*, 21 Eng Rep 50, 50 (Ch 1580).

⁹⁷ See Sir Edward Coke, *The first part of the Institutes of the lawes of England, or, A commentary upon Littleton, not the name of the author only, but of the law it selfe* 6b (2d ed 1639) (“[I]t hath beene resolved by the Justices, that a wife cannot be produced either against or for her husband, *quia sunt duae animae in carne una* [because they are two spirits in one flesh]”) (my translation).

⁹⁸ *Trammel*, 445 US at 44 (explaining further that “what was inadmissible from the lips of the defendant-husband was also inadmissible from his wife”).

⁹⁹ Wigmore, 8 *Evidence* § 2227 at 212 (cited in note 95).

¹⁰⁰ *Bentley v Cooke*, 99 Eng Rep 729, 729–30 (KB 1784) (deciding to exclude the testimony of a husband called by the defendant to prove his marriage to the plaintiff; three judges agreed that the rule applied in all cases, but one judge thought that the rule applied only in criminal cases); *Cole v Gray*, 23 Eng Rep 660, 661 (Ch 1688) (excluding a wife’s testimony about the amount of her husband’s estate because a wife cannot be a witness against her husband); Anonymous, 123 Eng Rep 656, 656–57 (CP 1613) (excluding a wife’s testimony against her husband under the common law in bankruptcy proceedings); Bankrupts Act, 21 Jac I, c 19, § 5 (1623) (establishing that a wife may be examined against her husband concerning concealment of goods in bankruptcy proceedings).

¹⁰¹ 123 Eng Rep 1140 (CP 1631).

band in a civil proceeding, but denied the privilege in a criminal trial.¹⁰² The case tried to draw a distinction between civil and criminal applications of the incompetence rule that does not seem to exist in earlier jurisprudence. Later judges, however, expressed doubt about the validity of the case because it excluded the privilege from criminal trials.¹⁰³ This confusion was perhaps natural: because the rule derived at least in part from the single legal existence of husband and wife, a civil application had no legal difference from a criminal application.

B. Modern Justifications: The *Stein* Policy Discussion

The spousal privileges first surfaced in American jurisprudence in 1839.¹⁰⁴ The defendant in *Stein v Bowman*¹⁰⁵ appealed, inter alia, the admission of a wife's testimony about her deceased husband's forgery in a civil dispute concerning a will.¹⁰⁶ Striking the wife's testimony on the grounds that the marital privilege protected husband, wife, and the peace of marriage, Justice M'Lean wrote:

This rule [of spousal disqualification] 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 of husband and wife, would be to destroy the best solace of human existence.¹⁰⁷

Justice M'Lean believed this policy to be so strong that the witness could not be permitted to testify even though her husband, the subject of her testimony, was dead and the particular marriage not in any danger.¹⁰⁸ M'Lean's policy justification concerned the institution of marriage, and not just the marriage involved in the case at hand.¹⁰⁹

¹⁰² Id at 1141 ("[I]t was resolved that in case of a common person, between party and party she could not [be a witness], but between the King and the party, upon an indictment she may."). Lord Audley was put on trial for instigating the rape of his wife and tried to prevent her from testifying. In another report of this case the judges permitted the wife's testimony because she was the wronged party, *Trial of Mervin Lord Audley*, 3 How St Tr 401, 402, 414 (1631) ("[W]here the wife is the party grieved, and on whom the crime is committed, she is to be admitted a witness against her husband."). See Wigmore, 8 *Evidence* § 2228 at 213 (cited in note 95) (discussing the differing accounts of *Lord Audley's Case*).

¹⁰³ See Wigmore, 8 *Evidence* § 2228 at 213 (cited in note 95).

¹⁰⁴ *Trammel*, 445 US at 44.

¹⁰⁵ 38 US 209 (1839).

¹⁰⁶ See id at 215 ("There is no known law, that prohibits man and wife from giving testimony in a cause between third persons.").

¹⁰⁷ Id at 223.

¹⁰⁸ Id at 223 ("[T]he witness was called to discredit her husband; to prove, in fact, that he

The *Stein* rule combined spousal incompetence to testify with a privilege rule that appears to match with the modern confidential communications privilege.¹¹⁰ American law had not yet separated a confidential communications privilege from an adverse testimonial privilege. Neither of these privileges had been separated from the incompetence rule prohibiting spousal testimony on account of the single legal existence of husband and wife. At various points in the opinion, the Court cited the incompetence rule,¹¹¹ a developing privilege rule,¹¹² and the confidential communications rule¹¹³ to support the holding that the witness cannot testify against her husband.

Once American law abolished the exclusion of testimony from parties interested in the litigation, and by extension the incompetence of spouses to testify for one another based on their single legal existence,¹¹⁴ the adverse testimonial privilege developed fully, and Justice M'Lean's policy ground of promoting domestic harmony remained as its only basis.¹¹⁵ In *Hawkins* the Court based its exclusion of a wife's testimony against her husband on "a belief that [the spousal testimonial privilege] policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now."¹¹⁶ The Court stressed the responsibility of law to protect the marital relationship: "[T]here is still a widespread belief . . . that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences."¹¹⁷ As late as 1980, the Supreme Court declared the spousal testimonial

had committed perjury It is true the husband was dead, but this does not weaken the principle. Indeed, it would seem rather to increase than lessen the force of the rule.").

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 222 (stating that although there had been differing decisions on a wife's ability to testify, all of the cases agree "that the wife is not competent, except in cases of violence upon her person, directly to criminate her husband; or to disclose that which she has learned from him in their confidential intercourse").

¹¹¹ *Id.* at 221 ("It is a general rule that neither a husband nor wife can be a witness for or against the other.").

¹¹² *Id.* at 223 ("Can the wife . . . either voluntarily, be permitted, or by force of authority be compelled to state facts in evidence, which render infamous the character of her husband?").

¹¹³ *Id.* at 222. See note 110.

¹¹⁴ *Funk v United States*, 290 US 371, 380-81, 386 (1933) (overturning lower court's disqualification of a wife's testimony on behalf of her defendant husband, because American law no longer prohibited interested parties from testifying, and therefore logically could not prevent the spouse of an interested party from testifying). *Funk* concerns the competence of one spouse to testify for another, and not the privilege claimed in order to avoid sanctions.

¹¹⁵ See, for example, *United States v Walker*, 176 F2d 564, 567-68 (2d Cir 1949) (excluding a wife's testimony offered to prove her husband had married bigamously); *id.* at 569 (Clark dissenting) ("Should we not therefore turn to the only solid ground . . . for the exclusion, namely, the promotion of marital peace, etc.?").

¹¹⁶ *Hawkins*, 358 US at 77.

¹¹⁷ *Id.* at 79.

privilege “ought not to be casually cast aside” and counseled caution toward any revision to this privilege “affecting marriage, home, and family relationships—already subject to much erosion in our day.”¹¹⁸

The policy justifications have been remarkably consistent through time, with one exception. Between *Stein* and *Hawkins*, the policy focus shifted from the protection of marriage as an institution to the protection of the particular marriage in the trial. The Court in *Hawkins* anchored its reasoning that the exclusion of the wife’s voluntary testimony fostered family peace in the belief that “not all marital flare-ups in which one spouse wants to hurt the other are permanent. The widespread success achieved by courts . . . in conciliating family differences is a real indication that some apparently broken homes can be saved provided no unforgivable act is done by either party.”¹¹⁹ The *Ryan* court turned *Stein* on its head by denying the spousal testimonial privilege because the particular marriage at issue, having lasted for forty years, could not reasonably be harmed—especially because Mr. Ryan had died during the course of the proceedings.¹²⁰

The case transforming the *Stein* institutional-protection rule into the *Ryan* specific-marriage rule was *Trammel v United States*, the Supreme Court’s latest interpretation of the spousal testimonial privilege.¹²¹ In exchange for use immunity, Elizabeth Trammel agreed to testify against her husband Otis Trammel in his criminal trial for drug smuggling.¹²² Otis Trammel claimed the adverse spousal testimonial privilege in order to stop his wife from testifying, and upon his conviction appealed the admission of her testimony.¹²³ The case presented the Court with the chance to update the privilege by firmly rejecting its ancient legal foundations,¹²⁴ and in that process to anchor the privilege explicitly in the protection of an ongoing and viable marriage. “When one spouse is willing to testify against the other in a criminal proceeding,” wrote Justice Burger for the Court, “their relationship is almost

¹¹⁸ *Trammel*, 445 US at 48.

¹¹⁹ *Hawkins*, 358 US at 77–78.

¹²⁰ *Ryan*, 568 F2d at 543. See notes 41–45 and accompanying text. The court stresses, however, that the death of Mr. Ryan did not moot the action, because the civil contempt sanctions continued in full force against Mrs. Ryan and the Estate of Raymond Ryan. *Ryan*, 568 F2d at 537 (“[W]e find it unnecessary to decide whether the criminal sanction should be vacated as moot and leave that issue to the Tax Court.”).

¹²¹ 445 US at 52 (basing the vesting of the privilege in the witness-spouse on the fact that a marriage is “almost certainly in disrepair” if one spouse is willing to testify against the other).

¹²² *Id.* at 42 (stating that the original indictment named Otis and Elizabeth Trammel, and after “discussions with Drug Enforcement Administration agents,” Elizabeth Trammel agreed to cooperate with the government).

¹²³ *Id.* at 43.

¹²⁴ *Id.* at 52 (“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.”).

certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve.”¹²⁵ Justice Burger also indicated that the specific marriage in the case should be taken into account when weighing the traditional interests at stake.¹²⁶

It is clear from the Court’s opinion that the protection of marriage—though now a specific marriage rather than the institution—played no less a part in the justification of the spousal testimonial privilege, even as the Court altered the privilege significantly by vesting it solely in the witness-spouse.¹²⁷ In fact, Justice Burger implied that vesting the privilege solely in the witness-spouse is the only way in which the marriage can be protected on a going-forward basis.¹²⁸

C. Justifications in the Lower Courts

Those courts that adopt a blanket denial or blanket application of the privilege do not engage in any discussion of the normative value of their holdings.¹²⁹ The courts permitting a limited application of the privilege in cases “tethered” to criminal proceedings express concern with potential criminal actions against the witness or the witness’s spouse,¹³⁰ but also do not engage in any discussion of the policy justifications for the civil-criminal distinction.

The *Sriram* court touched on justifications, openly doubting that adverse testimony by a spouse could ever promote marital harmony, whether that testimony occurred in a criminal or a civil case.¹³¹ Given the costs of allowing the privilege, however, the court would confine it to civil proceedings “tethered” to criminal proceedings.¹³² Though the court does not explain its balancing process, it seems clear that the court considered the risk to marital harmony simply “less” in civil trials than in criminal trials, and the state’s interest in obtaining the truth

¹²⁵ *Id.*

¹²⁶ *Id.* (stating that a rule permitting the defendant to prohibit a willing spouse from testifying was “far more likely to frustrate justice than to foster family peace”).

¹²⁷ *Id.* at 53 (“This modification . . . furthers the important public interest in marital harmony.”). *Trammel* establishes *Ryan*, where the witness refuses to testify against her spouse, as the characteristic privilege case, rather than *Hawkins* or *Gilles*, where one spouse can prevent the other from testifying. *Id.* (stating that “so sweeping a rule as that found acceptable by the Court in *Hawkins*” is no longer justified).

¹²⁸ *Id.* at 53 (“It hardly seems conducive to the preservation of the marital relation to place a wife in jeopardy solely by virtue of her husband’s control over her testimony.”).

¹²⁹ See Part II.B.3–4.

¹³⁰ See Part II.B.5.

¹³¹ 2001 US Dist LEXIS 542 at *9 (“This Court doubts that adverse testimony by a spouse ever would be likely to promote a harmonious marital relationship—whether that testimony came in a criminal case, or . . . a civil case.”).

¹³² *Id.* at *9–10 (balancing the interest of marital harmony with the costs of the privilege, “the Court finds that the spousal testimonial privilege would not apply to adverse testimony given by a spouse in a civil proceeding that is untethered to a criminal proceeding”).

correspondingly greater. This justification, however, does not rely on any overt policy differences between civil and criminal applications.

D. *Ryan* Redux: The Greater Rehabilitative Force

Of those few cases directly addressing the scope of the spousal testimonial privilege, only *Ryan* suggests a possible policy difference between a civil and a criminal application. Noting that the Advisory Committee Notes to Proposed Rule 505 did not explain why the Proposed Rule imposed a criminal-civil distinction, the Seventh Circuit suggested, "A partial explanation could be that the privilege has the greatest societal value in criminal cases because it encourages the preservation of a marriage that might assist the defendant spouse in his or her rehabilitation efforts. This rationale would not be applicable in a civil case."¹³³

Ryan finds a clear difference between the social function of the testimonial privilege in criminal and civil cases. No other circuit had justified the privilege based on its potential rehabilitative force. Previous jurisprudence focused instead on the likely damage to the marriage stemming from coerced testimony.¹³⁴ The Seventh Circuit had sounded this note before when recognizing a joint-participants exception to the privilege (when spouses participate in criminal action) in *United States v Van Drunen*:¹³⁵

Today's holding . . . limits the privilege to those cases where it make most sense, namely, where a spouse who is neither a victim nor a participant observes evidence of the other spouses's [sic] crime. In that circumstance, the privilege encourages the preservation of a marriage which may conceivably be an important institution contributing to the rehabilitation of the defendant spouse.¹³⁶

III. BROADER PRIVILEGE DOCTRINE

Courts have applied other evidentiary and testimonial privileges, including the Fifth Amendment privilege against self-incrimination, in the civil context. This Part will discuss broader privilege doctrine and

¹³³ *Ryan*, 568 F2d at 544, citing *Van Drunen*, 501 F2d at 1396.

¹³⁴ See, for example, *In re Grand Jury Subpoena*, 755 F2d 1022, 1026 (2d Cir 1985) (rejecting the Seventh Circuit's reasoning that in circumstances of joint participation in a crime, the marriage is unlikely to contribute to the rehabilitation of a spouse: "rehabilitation had never been regarded as one of the interests served by the spousal privilege and, so far as it is a factor, participation in a joint crime would not necessarily remove the remorse which would trigger rehabilitation").

¹³⁵ 501 F2d 1393 (7th Cir 1974).

¹³⁶ *Id* at 1397.

the underlying justifications that allow the availability of privileges in civil proceedings. The civil applications of these privileges support some extension of the spousal testimonial privilege into a civil context.

A. The Fifth Amendment Privilege

By its own terms, the Fifth Amendment privilege against self-incrimination applies only to criminal proceedings: "No person . . . shall be compelled in any criminal case to be a witness against himself."¹³⁷ A witness or party may invoke the privilege when he believes there is a reasonable possibility that criminal charges might follow for crimes revealed by the response.¹³⁸ Availability turns on the nature of the statement—testimonial self-incrimination—and the exposure it invites, not the nature of the proceedings.¹³⁹ Therefore, it may be asserted by parties or witnesses to *civil* litigation, at various stages, including deposition, interrogatories, or trial, if the witness reasonably believes criminal charges could stem from any testimony given.¹⁴⁰ Instances where a party may claim a Fifth Amendment privilege include any civil action based on conduct that is itself an element of a crime, such as securities actions based on fraud, antitrust actions based on violations of the Sherman Act, or civil rights actions involving assault.¹⁴¹

¹³⁷ US Const Amend V.

¹³⁸ *Hoffman v United States*, 341 US 479, 486 (1951) ("The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.").

¹³⁹ *In re Gault*, 387 US 1, 49–50 (1967) (holding that the Fifth Amendment privilege may be asserted in a juvenile proceeding).

¹⁴⁰ *Lefkowitz v Turley*, 414 US 70, 77 (1973) ("The Amendment not only protects the individual . . . in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.").

¹⁴¹ See *In re Folding Carton Antitrust Litigation*, 609 F2d 867, 872 (7th Cir 1979) (antitrust); *Coalition of Black Leadership v Cianci*, 480 F Supp 1340, 1343–44 (D RI 1979) (assault); *In re Penn Central Securities Litigation*, 347 F Supp 1347, 1348 (E D Pa 1972) (securities). See also Robert Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 Yale L J 1062, 1065–66 nn 5–10 (1982) (listing examples of civil cases in which the Fifth Amendment privilege was claimed). Some federal statutes permit parallel criminal and civil proceedings: the Sherman Act, 15 USC §§ 1–3, 15, 15(a) (1988); the Internal Revenue Code, 26 USC § 7201 (1988); the Securities Act of 1933, 15 USC § 77 (1988); and the Racketeer Influenced and Corrupt Organizations Act, 18 USC §§ 1961–68 (1988 & Supp 1991). The Supreme Court has upheld Fifth Amendment privilege claims in tax evasion cases brought subsequent to criminal charges for engaging in unlawful activity. *Marchetti v United States*, 390 US 39, 52–54 (1968) (finding that a federal requirement to register and pay an occupational tax on unlawful wagering had a substantial risk of incriminating petitioner, and defendant rightly claimed Fifth Amendment privilege for his refusal to perform such registration and payment).

In *Murphy v Waterfront Commission of New York Harbor*,¹⁴² the Court set out the justifications behind the Fifth Amendment:

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown . . . and by requiring the government in its contest with the individual to shoulder the entire load," . . . and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."¹⁴³

Madison's original language read "no person shall be compelled to be a witness against himself," but was amended to limit the privilege explicitly to criminal cases on a delegate's objection that as written the amendment contradicted laws already passed.¹⁴⁴ The drafters of the Bill of Rights deliberately chose to restrict the protection of the Fifth Amendment to criminal proceedings—those in which the state was an actor. If the purpose of the Fifth Amendment is to protect the individual from governmental coercion, then its explicit limitation to criminal proceedings stems from the absence of governmental participation in the private dangers of public embarrassment or civil penalties.¹⁴⁵ For witnesses in civil actions where the government is the plaintiff, however, the Fifth Amendment may be especially relevant. For example, a defendant in a civil forfeiture proceeding who is unable to invoke the Fifth Amendment may find his testimony admitted in a later criminal trial.¹⁴⁶ The Fifth Amendment civil applications maintain

¹⁴² 378 US 52, 77–78 (1964) (holding that the Fifth Amendment protects a witness whose testimony was compelled in a state proceeding from having that testimony used against him in a federal proceeding).

¹⁴³ *Id.* at 55 (citations omitted).

¹⁴⁴ 1 Annals of Congress 782 (Gales and Seaton 1834) (Mr. Lawrence objected to Madison's clause because it "contained a general declaration, in some degree contrary to laws passed. . . . He thought [the amendment] ought to be confined to criminal cases, and moved an amendment for that purpose; which amendment being adopted, the clause as amended was unanimously agreed to.").

¹⁴⁵ See *Hale v Henkel*, 201 US 43, 66–67 (1906) (The Fifth Amendment does not declare that "he may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him, but the line is drawn at testimony that may expose him to prosecution.").

¹⁴⁶ See Sandra Guerra, *Between a Rock and a Hard Place: Accommodating the Fifth Amendment Privilege in Civil Forfeiture Cases*, 15 Ga St U L Rev 555, 555–60 (1999) (discussing the potential "catch-22" in which a defendant may find himself in civil forfeiture proceedings). For an example of differing treatment of the confidential communications privilege and the ad-

the civil-criminal divide by tying the privilege to the type of inquiry rather than the type of proceeding.¹⁴⁷

B. The Confidential Communications Privileges

The confidential communications privileges, including the privilege between spouses, do not distinguish between criminal and civil applications.¹⁴⁸ The newest confidential communications privilege recognized by the Supreme Court, a psychotherapist-patient privilege, arose in the context of a damages claim under 42 USC § 1983 for deprivation of civil rights.¹⁴⁹

Wigmore's four-part test for the recognition of confidential communications privileges contains much of the policy justifications behind those privileges: (1) the communications must originate in confidence that they will not be disclosed; (2) confidentiality must be essential to the effectiveness of the relationship; (3) the relationship is one which the public believes should be fostered; and (4) the injury resulting from the disclosure must be greater than the benefit gained by the litigation.¹⁵⁰ These policies suggest that the harm suffered by disclosure of a confidential communication will be the same regardless of whether the confidence is broken in a civil case or a criminal case. Moreover, those professions that rely on confidential communications, such as the legal profession, will suffer overall whenever any particular confidence is disclosed. In *Jaffee v Redmond*,¹⁵¹ the Court stressed that "confidential conversations between psychotherapists and their patients would surely be chilled" if no such privilege existed.¹⁵² Since "the mere possibility of disclosure [might] impede development of the confidential relationship necessary for successful treatment," which "serves the public interest," the privilege deserved (and received) recognition.¹⁵³

verse testimonial privilege in the same case, see *Engelmann*, 1995 US Dist LEXIS 4725 at *5.

¹⁴⁷ See *Hoffman*, 341 US at 486–87 ("To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer . . . might be dangerous because injurious disclosure could result.").

¹⁴⁸ See FRE 501. Wigmore notes the restrictions on the marital confidential communications privilege. See Wigmore, 8 *Evidence* §§ 2338–41 at 665–75 (cited in note 95).

¹⁴⁹ *Jaffee v Redmond*, 518 US 1, 15 (1996) (concluding that the privilege not only covers "confidential communications made to licensed psychiatrists and psychologists," but also "should extend . . . to licensed social workers in the course of psychotherapy").

¹⁵⁰ Wigmore, 8 *Evidence* § 2285 at 527 (cited in note 95) (listing these fundamental conditions for the establishment of the privilege and stating that a privilege should only be recognized if they are present).

¹⁵¹ 518 US 1 (1996).

¹⁵² *Id.* at 11–12.

¹⁵³ *Id.* at 10–12. Commentators argue much the same grounds for the recognition of a parent-child confidential communications privilege. See, for example, Kimberly L. Schilling, Note, *Intrafamilial Communications: An Analysis of the Parent-Child Privilege*, 37 *Fam & Conciliation*

IV. AN EVOLVING PRIVILEGE RULE

FRE 501 gives a broad grant of authority to the courts to develop privileges “in the light of reason and experience.”¹⁵⁴ The Rule establishes a law of privilege that evolves in response to social pressures as well as legal doctrines. Based on historical justifications and analogous privilege doctrine, this Comment proposes a spousal testimonial privilege that applies in civil proceedings in which there are governmental actors. In the spirit of the other evidentiary privileges, this proposed rule should be applied globally rather than on a case-by-case basis.

American law inherited English common law’s confusion between spousal incompetence on the grounds of a single legal existence and the spousal testimonial privilege.¹⁵⁵ As the spousal incompetence rule was abolished, policy justifications replaced the former legal underpinnings of the privilege rule.¹⁵⁶ This Comment suggests that when a single legal existence served as the reason for the privilege, common law could draw no distinction between a criminal and a civil application. Once policy justifications replaced the strictly legal basis for the rule, however, common law then developed some notion of a distinction between civil and criminal applications.

The language of FRE 501 does not limit the spousal privilege to federal criminal cases.¹⁵⁷ The limitation may spring from dicta in *Hawkins*¹⁵⁸ and *Trammel*,¹⁵⁹ but neither case explicitly limits the availability of the privilege to criminal trials. Lower courts disagree on the scope of the privilege.¹⁶⁰ While identifiable lines of analysis exist in those courts’ decisions, no consistent theory has emerged that both recognizes the justifications for the privilege and offers a coherent reason for limiting or expanding it. Federal courts, in fact, do not yet agree on the ability of the privilege to protect or preserve marriage when both spouses participate in criminal conduct.¹⁶¹

Cts Rev 99, 111–13 (1999) (arguing that “privileges are recognized primarily to protect relationships that society deems valuable, and all must concede that the parent-child relationship is valuable to society”).

¹⁵⁴ FRE 501. See note 12.

¹⁵⁵ See *Stein v Bowman*, 38 US 209, 222 (noting that the law is unsettled on “how far . . . a wife may be examined on matters in which her husband may be interested” but adding she is not competent to testify against him or to testify to confidential communications). See also Part II.B, particularly notes 110–13 and accompanying text; Part III.B.

¹⁵⁶ *Id.* at 223. See text accompanying note 107.

¹⁵⁷ FRE 501.

¹⁵⁸ *Hawkins*, 358 US at 77 (“[T]he law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake.”) (emphasis added).

¹⁵⁹ *Trammel*, 445 US at 51 (“[T]he *Hawkins* privilege is invoked . . . to exclude evidence of criminal acts.”) (emphasis added).

¹⁶⁰ See Part I.B.

¹⁶¹ See *id.* See also note 57.

The difficulty with denying the spousal testimonial privilege in all civil trials is simply the fact of the marriage. If the policy behind the privilege is to promote family peace, and if those bonds are the basis of all civil society, as Justice M'Lean claimed in *Stein*,¹⁶² then the policy gives no basis for distinguishing between marital harmony in a criminal case and marital harmony in a civil one. The *Sriram* court openly "doubts that adverse testimony by a spouse ever would be likely to promote a harmonious marital relationship—whether that testimony came in a criminal case, or (as here) a civil case."¹⁶³ Historical justifications before *Ryan*¹⁶⁴ and *Van Drunen*¹⁶⁵ simply do not theorize any distinction between criminal and civil applications.¹⁶⁶

Broader privilege doctrine, however, draws some sensible distinctions between criminal and civil applications.¹⁶⁷ The Fifth Amendment civil applications are largely associated with governmental action,¹⁶⁸ where a civil proceeding is ancillary to a criminal proceeding,¹⁶⁹ or where a civil forfeiture proceeding levels a penalty.¹⁷⁰ Like the Fifth Amendment privilege, the spousal testimonial privilege protects against coerced testimony.¹⁷¹ But while government actors may offer immunity in response to Fifth Amendment claims, no such parallel protection exists when spouses claim the spousal testimonial privilege.

The confidential communications privileges protect institutions—largely professional relationships, but marriage as well.¹⁷² From the time the spousal testimonial privilege became attached to the particular marriage in the case at bar (as in *Ryan*¹⁷³) and not to the institution (as in *Stein*¹⁷⁴) the same justifications cannot hold. The anti-marital facts privilege as it has developed in American law is an individual privilege, associated with the specific marriage for which it is claimed, and not a "marriage-wide" privilege in the same way the attorney-

¹⁶² 38 US at 223. See text accompanying note 107. See also Part II.B.

¹⁶³ 2001 US Dist LEXIS 542 at *9.

¹⁶⁴ 568 F2d at 544 (explaining that "the privilege has the greatest societal value in criminal cases because it encourages the preservation of a marriage that might assist the defendant spouse in his or her rehabilitation efforts").

¹⁶⁵ 501 F2d at 1397. See text accompanying note 136.

¹⁶⁶ See Part II.A.

¹⁶⁷ See Part III.

¹⁶⁸ See *Campbell v Gerrans*, 592 F2d 1054, 1058 (9th Cir 1979) (holding that the plaintiff was able to invoke the Fifth Amendment during the discovery stage of a § 1983 case against police officers).

¹⁶⁹ For federal statutes that permit parallel criminal and civil proceedings, see note 141.

¹⁷⁰ See, for example, *United States v United States Coin and Currency*, 401 US 715, 721–22 (1971) (holding that a convicted gambler could successfully invoke a Fifth Amendment privilege in a civil forfeiture proceeding against his property).

¹⁷¹ See Part III.

¹⁷² See Strong, *McCormick on Evidence* § 72 at 114–15 (cited in note 27).

¹⁷³ 568 F2d at 543.

¹⁷⁴ 38 US at 223.

client privilege applies profession-wide. Unlike many of the professions that claim the confidential communications privileges, marriage has no official code of ethics,¹⁷⁵ and the privilege does not exist to foster a certain kind of conduct, but rather to protect the marriage on a going-forward basis.¹⁷⁶ The spousal testimonial privilege does not have the same kind of incentive effect on future behavior as the confidential communications privileges.¹⁷⁷ If Elizabeth Trammel testifies willingly against Otis Trammel, her behavior is not likely to affect anyone's decision to marry. On the other hand, if an attorney reveals a client confidence, that disclosure is likely to affect potential clients' decisions to discuss legal issues with their attorneys truthfully.¹⁷⁸

The Seventh Circuit's decision in *Ryan* tries to tie the privilege to this kind of incentive effect, and allows a justification more along the lines of the justifications for the confidential communications privileges.¹⁷⁹ The decision makes a certain amount of sense if the privilege is perceived as a rule concerning conduct—much like the confidential communications privileges—rather than as a solely protective rule. In the Seventh Circuit's formulation, marriages encourage or aid rehabilitative conduct, and therefore the privilege against testifying should only apply in proceedings where the rehabilitative force of marriage is great.¹⁸⁰ *Van Drunen*'s joint-participants exception also fits this conduct-based mode.¹⁸¹

The civil applications of the Fifth Amendment, and the application of the confidential communications privileges in both civil and criminal cases, support some extension of the spousal testimonial privilege into federal civil proceedings. The nature of civil proceedings, however, argues against the same broad sweep of the privilege as in criminal trials. The milder the consequence of the litigation—a fine or penalty for civil damages—the less courts and the public should worry about the harm of coerced testimony to the marriage.¹⁸² In this way, the outcome of the *Sriram* court's balancing test¹⁸³ seems a practical and

¹⁷⁵ See, for example, *Model Rules of Professional Conduct* (ABA 2000).

¹⁷⁶ See, for example, *Hawkins*, 358 US at 77–78 (explaining that the rule is in place to prevent “bitterness,” protect “family harmony,” and prevent the destruction of any given marriage).

¹⁷⁷ See Strong, *McCormick on Evidence* § 72 at 115 (cited in note 27) (stating that “communications between husband and wife . . . are not primarily induced by the privileges accorded them”).

¹⁷⁸ See *Model Rules of Professional Conduct*, Rule 1.6 cmt 4.

¹⁷⁹ *Ryan*, 568 F2d 531.

¹⁸⁰ *Id.* at 544.

¹⁸¹ *Van Drunen*, 501 F2d at 1397. See text accompanying note 136.

¹⁸² In some civil cases, coerced testimony is not likely to lead to any harm at all. For example, the Internal Revenue Code permits married persons to file jointly. 26 USC § 1 (2001). In these cases, the tax deficiency action is leveled at the “marriage” as whole and not the individual husband or wife.

¹⁸³ 2001 US Dist LEXIS 542 at *9. See notes 76–78 and accompanying text.

manageable restriction of the privilege's scope. When there is a strong likelihood that the coerced testimony will be brought into a criminal proceeding, and therefore may expose the marriage to the sort of harm against which the privilege protects, the court should grant the privilege.

On the other hand, when civil proceedings are not tethered to ongoing criminal trials, the *Sriram* rule fails to protect potential witnesses or parties to later proceedings. In these cases the Fifth Amendment's broader exclusionary principles are normatively attractive: when in the reckoning of the witness the coerced testimony invites any possibility of criminal prosecution (and therefore exposes the marriage to harm), courts should permit the privilege.

One possible combination of the Fifth Amendment principles and the normative justifications of protecting a marriage from the substantial harm threatened by coerced testimony in a criminal proceeding is a rule that ties the privilege to any proceeding in which the government is a party. This rule reconciles the *Hawkins* "life or liberty" rule¹⁸⁴ with a privilege that applies in civil proceedings under the expansive language of FRE 501, by importing certain principles behind the Fifth Amendment civil applications. "Life or liberty," as the Fifth Amendment civil cases demonstrate,¹⁸⁵ may be in jeopardy outside criminal proceedings. Some civil proceedings, such as the INS deportation hearing in *Gilles*,¹⁸⁶ directly threaten to restrict life or liberty. This rule expands the notion of "life or liberty" in *Hawkins*, but not beyond the understanding of current law: restrictions to life or liberty are not confined to criminal cases, but may occur in civil proceedings as well.

It is important to recognize that the Supreme Court's statements from *Hawkins*¹⁸⁷ and *Trammel*¹⁸⁸ used to support a restriction to criminal cases, though made in the context of criminal proceedings, do not positively exclude the privilege from civil actions. Instead, the lack of specificity regarding the civil-criminal divide suggests the privilege may be invoked in response to inquiries concerning "life or liberty." Tracking the expanded understanding of Fifth Amendment applications in civil proceedings,¹⁸⁹ the rule could tie the applicability of the privilege to governmental actions that directly threaten to restrict the defendant's "life or liberty," such as civil forfeiture or antitrust proceedings. Thus the Court could hinge the availability of the privilege

¹⁸⁴ *Hawkins*, 358 US at 77.

¹⁸⁵ See notes 138–41.

¹⁸⁶ 150 F Supp 864. See text accompanying notes 58–63.

¹⁸⁷ 358 US at 76. See text accompanying note 32.

¹⁸⁸ 445 US at 51. See text accompanying notes 34–35.

¹⁸⁹ See Part III.A.

on the type of *inquiry*, not on the type of proceeding in which the inquiry takes place. A spousal testimonial privilege tied to any inquiry in which the government was an actor would protect the marriage from any governmental incentive to bring civil charges in advance of criminal proceedings. At the same time, the rule would protect marriages against any kind of governmental coercion that might lead to forced testimony and harm the relationship on a going-forward basis.

This rule will not solve some problems on the margins. For example, the rule would not address the *Ryan* problem, where the availability of the privilege would have allowed the Ryans to refuse to answer any governmental interrogatories.¹⁹⁰ However, the government had offered use immunity to both Ryans for their testimony,¹⁹¹ and this tool—avoiding prosecution of either spouse for the actions that the testimony of the other spouse would have revealed—is perhaps the best solution for a *Ryan*-type situation.

More difficult to solve are those situations where one spouse faces a large civil damage penalty for tort actions, for example if he or she is the sole owner of a polluting factory sued by families living beside a polluted river. It is difficult to argue that the compelled testimony of the other spouse, which could lead to a high dollar amount of liability, would not harm the marriage on a going-forward basis. In these cases, the elements of the tort may give rise to criminal action, in which case the Fifth Amendment will be available to the owner-spouse, and the witness-spouse may successfully claim the testimonial privilege. Alternatively, the government may file civil charges, in which case the privilege may also be available. Ultimately, however, the rule leaves this gray area uncovered. It may be that society, or the marriage, relies on legal restrictions on piercing the corporate veil to hold down the personal liability of the owner-spouse to the level of “public embarrassment or civil penalties” that the analogous Fifth Amendment excludes from coverage.¹⁹²

This modified rule reconciles the conflicting strands in the lower courts. In *Abbott*¹⁹³ and *Engelmann*,¹⁹⁴ civil proceedings without government actors, courts denied the applicability of the privilege. On the other hand, in *Sriram*¹⁹⁵ and *Yerardi*,¹⁹⁶ proceedings in which govern-

¹⁹⁰ *Ryan*, 568 F2d at 543 (“The Ryans have resisted every attempt to wrest information about their income for the years in question If some method to obtain the information other than through the interrogatories existed, it is likely that the Commissioner would have utilized it during the eight years that the action has been pending.”).

¹⁹¹ *Id.* at 536.

¹⁹² See note 145 and accompanying text.

¹⁹³ 1997 US Dist LEXIS 8500. See notes 51–52 and accompanying text.

¹⁹⁴ 1995 US Dist LEXIS 4725. See notes 53–54 and accompanying text.

¹⁹⁵ 2001 US Dist LEXIS 542. See notes 72–78 and accompanying text.

¹⁹⁶ 192 F3d 14. See notes 65–71 and accompanying text.

ment actors claimed that the privilege did not apply, the courts allowed it. The application in *Gilles*,¹⁹⁷ more related to a restriction of liberty than to a purely civil matter, would also fall under this rule. The rule would eliminate the need for courts to pass judgment on the viability of marriages and the likelihood that the protection offered by the privilege will have any effect.¹⁹⁸

CONCLUSION

Case law on the spousal testimonial privilege gives no clear answer on its application in the federal civil context. This Comment suggests some extension of the privilege into the civil context, a rule allowing spouses to assert the privilege when governmental actors are a party. Such a rule would protect the marriage relationship against the kind of harm that governmental coercion of testimony could provoke. At the same time the rule acknowledges the social necessity of the fact-finding function of courts in purely civil matters, where the search for truth outweighs the comparatively minor damage a marriage might suffer.

¹⁹⁷ 150 F Supp 864. See notes 58–63 and accompanying text.

¹⁹⁸ See, for example, *Maltifano*, 633 F2d at 279 (“[W]e are not confident that courts can assess the social worthiness of particular marriages or the need of particular marriages for the protection of the privilege.”).