Washington Law Review

Volume 98 | Number 2

6-1-2023

Marital Disharmony: Examining the Adverse Spousal Testimonial Privilege and Its Impact in Washington State

Sabrina Suen
University of Washington School of Law

MARITAL DISHARMONY: EXAMINING THE ADVERSE SPOUSAL TESTIMONIAL PRIVILEGE AND ITS IMPACT IN WASHINGTON STATE

Sabrina Suen*

Abstract: In Washington State, RCW 5.60.060(1) provides that "[a] spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner." This evidence rule, known as the adverse spousal testimonial privilege, allows a defendant to exclude witness testimony by their spouse under most circumstances. A product of common law tradition, this privilege stems from a time when the law treated women as chattel with no independent legal rights. Since Washington State codified the adverse spousal privilege, the United States Supreme Court amended the federal spousal testimonial privilege by vesting the power to determine whether to testify or not in the witness-spouse. That is, a witness-spouse may choose not to testify against the defendant-spouse, but the defendant-spouse cannot prevent the witness-spouse from willingly testifying. After this landmark decision, most states followed suit and amended their evidentiary rules to reflect the federal standard. However, Washington State remains one of four states that still retains the common law tradition as it once was, allowing the defendant-spouse to prevent spousal testimony (with a few specific exceptions). This Comment contrasts the evolution of the adverse testimonial privilege at the federal level with Washington State. It examines how Washington courts are slowly chipping away at the edges of this statutory privilege in the absence of legislative action. This Comment argues that despite legislative efforts to modernize the privilege by creating certain exceptions, the Washington rule remains overly burdensome for testifying witness-spouses to overcome and perpetuates historical inequities for women, who are often the witnesses and victims of their husband's crimes. Finally, this Comment recommends that the Washington State Legislature follow federal precedent and vest the privilege solely in the witness-spouse.

INTRODUCTION

In 1907, a jury convicted Nels Winnett of statutory rape after having sexual relations with Bessie Braden and impregnating her while she was under eighteen.[1] Shortly after the alleged rape, Winnett married Braden.[2]

* J.D. Candidate, University of Washington School of Law, Class of 2023. Thank you to Professor Mary Fan and all my colleagues on *Washington Law Review* for their insightful feedback and meticulous edits throughout this entire process.

1. State v. Winnett, 48 Wash. 93, 92 P. 904 (1907).

2. *Id.*

At trial, the State of Washington attempted to call Braden as a witness; however, because of her subsequent marriage to Winnett, the State barred her from testifying against her rapist-turned-husband.[3] On appeal, the Washington State Supreme Court sharply admonished the state's lawyers for calling Braden as a witness and forcing Winnett to invoke the adverse spousal testimonial privilege in front of a jury that had already seen the obviously pregnant girl.[4] Concerned that the prosecution's actions of "forcing the person of the wife upon the attention of the jury"[5] could "prejudice the rights"[6] of Winnett, the court vacated the trial court's conviction and granted him a new trial.[7]

The legal basis that allowed Winnett to exclude the testimony of his wife (and victim) is the adverse spousal testimonial privilege. Washington State codified this common law privilege in RCW 5.60.060(1) which provides that "[a] spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner."[8] Once prominent throughout the United States, this common law rule is a holdover from a time when the law saw women as property or chattel and women did not possess independent legal rights.[9] The privilege permits the defendant-spouse to control the witness-spouse's ability to testify, and often ends up excluding probative evidence that is vital to seeking justice.[10] A majority of states have since abolished the privilege; however, Washington remains one of the few states that still retains it.[11] In fact, in *Trammel v. United States*,[12] the United States Supreme Court recognized that the "ancient foundations for so sweeping a privilege have long since disappeared."[13] In that case, the Court held that "the witness-spouse alone has a privilege to refuse to testify adversely"[14] and cannot be "compelled to testify nor foreclosed from testifying."[15]

---

3. *Id.*

4. *Id.*

5. *Id.* at 96.

6. *Id.*

7. *Id.*

8. WASH. REV. CODE § 5.60.060(1) (2016).

9. *See* Katherine O. Eldred, *"Every Spouse's Evidence": Availability of the Adverse Spousal Testimonial Privilege in Federal Civil Trials*, 69 U. CHI. L. REV. 1319 (2002).

10. *Id.*

11. State v. Roach, 18 Wash. App. 2d 98, 116, 489 P.3d 283, 293 (2021) (Coburn, J., concurring) ("Washington is one of just four states where the defendant spouse alone holds the privilege.").

12. 445 U.S. 40 (1980).

13. *Id.* at 52.

14. *Id.* at 53.

15. *Id.*

Since *State v. Winnett*,[16] the adverse spousal testimonial privilege has changed significantly within Washington State. In 2023, under a statutory exception, Bessie would be allowed to testify against her husband for the alleged rape because she was the victim of the crime at issue.[17] However, the core foundations of the privilege remain intact.[18] Instead of abolishing the privilege, Washington State simply created an array of exceptions to the privilege that have largely kept it in place. For example, under current Washington rules, if a husband murdered a third party in the presence of his wife, he could prevent his wife from testifying against him, despite her witnessing the murder.[19] As long as the husband did not commit a crime against his wife or a child in their care, his wife cannot be compelled to testify against him without his permission.[20]

This Comment proceeds in four parts. Part I explores the history and evolution of the adverse spousal testimonial privilege at the federal level. This Part also explains how and why federal jurisprudence began moving away from the privilege, eventually abolishing it under the landmark *Trammel* decision. Part II looks at the evolution of privilege under Washington State statutory and common law. This Part describes how Washington courts have interpreted the statutory privilege. Specifically, this Part looks at how Washington courts are slowly and naturally moving away from the privilege in the absence of legislative action. Part III explores the most common modern justifications for the spousal testimonial privilege and poses that any potential policy change should, first and foremost, protect the interests of the witness-spouse. Finally, Part IV recommends that the Washington State Legislature reform the privilege by following federal precedent and vesting it in the witness-spouse alone. Additionally, this Part reexamines a few prominent Washington cases and explains how they would play out differently under this Comment's proposed solution.

I. THE HISTORY AND EVOLUTION OF THE ADVERSE SPOUSAL TESTIMONIAL PRIVILEGE UNDER FEDERAL LAW

This Part explores the history of the adverse spousal testimonial privilege under federal law. Section I.A gives a historical overview of the privilege, explaining its origins and the relevant case law that shaped its

16. 48 Wash. 93, 92 P. 904 (1907).

17. *See* WASH. REV. CODE § 5.60.060(1) (2016).

18. *See* State v. Thornton, 119 Wash. 2d 578, 581–82, 835 P.2d 216, 217–19 (1992).

19. *See id*.

20. *See id.*

evolution. Section I.B goes on to describe the abolition of the common law privilege by the United States Supreme Court in *Trammel v. United States*.

A. The Common Law History of the Spousal Testimonial Privilege

Under common law tradition, the adverse spousal testimonial privilege allows one spouse to refuse to testify against the other spouse without sanction from the court. The common law privilege provided a broad scope, even allowing the exclusion of communications made in the presence of third persons.[21] Essentially, the privilege allowed the defendant-spouse to exclude all adverse testimony from the witness-spouse during the marriage in criminal trials.[22]

This testimonial privilege went hand in hand with the still widely accepted spousal confidential communications privilege. This privilege protects communications between spouses made during the marriage that were intended to be confidential between the spouses.[23] Unlike the testimonial privilege, the communications privilege applies in both civil and criminal contexts and is still nearly universally accepted by federal and state courts.[24] This Comment only addresses issues relating to the testimonial privilege. Other cases or controversies relating to the communications privilege are outside the scope of this Comment.

At common law, the adverse spousal testimonial privilege rested on a desire to foster peace in the family and to prevent the use of testimony from witnesses with a strong self-interest to testify falsely.[25] In early common law, courts presumed that because defendants themselves were barred as witnesses on their own behalf due to conflicting interest, it was only natural to bar their spouses based on the legal fiction that husband and wife were one person.[26]

However, courts recognized certain exceptions to this rule. In the 1839 case *Stein v. Bowman*,[27] while recognizing the general rule that neither husband nor wife could be a witness for or against the other, the United States Supreme Court noted that the rule did not apply where the husband

---

21. Eldred, *supra* note 9, at 1321; *Trammel*, 445 U.S. at 51–53.

22. Michael W. Mullane, Trammel v. United States*: Bad History, Bad Policy, and Bad Law*, 47 ME. L. REV. 105, 108 (2018).

23. Emily Crawford Sheffield, Comment, *Rationalizing a Spousal Confidential Communications Privilege Fit for the Twenty-First Century*, 74 VAND. L. REV. EN BANC 187, 193 (2021).

24. *Id.* at 194.

25. Hawkins v. United States, 358 U.S. 74 (1958).

26. *Id.* at 75.

27. 38 U.S. 209 (1839).

committed an offense against the person of his wife.[28] Additionally, the Court acknowledged that in some cases, a wife may be a witness in a case where the husband has some vested interest.[29] But importantly, the Court emphasized that no exception left spouses free to testify for or against each other simply because they desired to do so.[30] As the Court stated:

> The rule which protects the domestic relations from exposure, rests upon considerations connected with the peace of families. And it is conceived that this principle does not merely afford protection to the husband and wife, which they are at liberty to invoke or not, at their discretion, when the question is propounded; but it renders them incompetent to disclose facts in evidence in violation of the rule.[31]

While this case was a civil action involving a wife's testimony about conversations she had with her husband, the Court seemed to be concerned about the broader questions involved in the application of the privilege.[32]

With little variation, most federal courts followed this application of the testimonial privilege until 1933 when, in *Funk v. United States*,[33] the Supreme Court rejected the aspect of the common law rule which excluded testimony by spouses for each other.[34] In this case, the government charged John S. Funk with conspiracy to violate the National Prohibition Act.[35] At trial, he called his wife to testify on his behalf; however, the Court excluded her testimony on grounds of incompetency and Funk was convicted.[36]

The Court acknowledged that both England and the United States had long since abolished the common law rules disqualifying witnesses with interests in a case.[37] The Court noted that "what was once regarded as a sufficient ground for excluding the testimony of such persons altogether has come to be uniformly and more sensibly regarded as affecting the credit of the witness only."[38] While the Court acknowledged the desire to exclude witnesses with a personal interest in the outcome of the case, it

28. *Id.* at 221.
29. *Id.*
30. *Id*. at 222.
31. *Id*. at 222–23.
32. Hawkins v. United States, 358 U.S. 74, 75 (1958).
33. 290 U.S. 371 (1933).
34. *Id.*
35. *Id.* at 373.
36. *Id.*
37. *Id.* at 380.
38. *Id.*

also recognized that widespread disqualification because of interest had long since become obsolete in both the United States and England.[39] The Court noted that cross-examination and the increased intelligence of jurors had minimized the danger that an interested witness would not speak the truth.[40]

Additionally, the Court in *Funk* discussed how modern law allowed defendants to testify in their own favor and left the credibility determination to the jury.[41] Therefore, if defendants themselves were allowed to testify, a reason no longer existed to exclude favorable testimony from their spouses.[42] The Court noted that permitting the defendant—who has the greatest interest in the case—to testify on their own behalf whilst barring the defendant's spouse creates an inherently incongruent–seeming, ironic policy.[43] The Court also justified its divergence from traditional common law in the absence of legislative action by arguing that courts should judge all rules of evidence based on their ability to aid the successful development of the truth.[44] However, while *Funk* moved away from certain common law traditions, it left undisturbed the rule that either spouse could prevent the other from giving adverse testimony.[45]

Still, jurisprudence continued to move away from the adverse spousal testimonial privilege as legal scholars sharply criticized its medieval and outdated justifications.[46] In *Trammel v. United States*, the decision that abolished the privilege on the federal level, the United States Supreme Court cited various scholars criticizing the privilege. This included renowned scholar of evidence law Professor John H. Wigmore, who termed the privilege "the merest anachronism in legal theory and an indefensible obstruction to truth in practice."[47] In place of the broad privilege, he suggested a privilege protecting only marital communications, similar to the attorney-client privilege or doctor-patient privilege.[48] Notably, Professor Wigmore proposed analyzing all

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*at 381.

44. *Id.*

45. Trammel v. United States, 445 U.S. 40, 44 (1980) (citing *Funk*, 290 U.S. at 373).

46. *Id.*

47. *Id.* at 45 (quoting 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 221 (McNaughton ed., rev. ed. 1961)).

48. *Id.*

evidentiary privileges under the so-called "utilitarian approach."[49] That is, privileges are only justified if the social benefit that comes from recognizing the privilege outweighs the cost of the potential loss of information.[50] To Wigmore, the testimonial privilege clearly did not satisfy this framework.[51]

Wigmore and other legal scholars' criticisms of the privilege were highly influential. In the 1942 Model Code of Evidence, the American Law Institute expressly rejected the rule that allowed the defendant-spouse to exclude all adverse testimony of the witness-spouse.[52] In 1953, the Uniform Rules of Evidence[53] issued similar guidance, limiting the privilege to the confidential communications and "abolish[ing] 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."[54]

Nonetheless, in *Hawkins v. United States*,[55] decided in 1958, the Supreme Court again upheld the viability of the privilege in federal courts and overruled the district court's decision to allow the witness-spouse to testify over the objections of the defendant.[56] In *Hawkins*, the district court in Oklahoma convicted and sentenced the defendant to five years imprisonment for violating the Mann Act (also known as the White-Slave Trafficking Act) when he transported a girl from Arkansas to Oklahoma for "immoral purposes."[57] At trial, the district court allowed the defendant's wife to testify as a witness against him.[58] On appeal, the Tenth Circuit upheld the district court's decision.[59] In the Supreme Court's opinion, it cited the *Funk* decision and admitted that the rule forbidding testimony of one spouse in support of the other rested on reasons which time and changing legal practices had undercut.[60] However, the Court was not prepared to say the same about the rule barring testimony of one

49. Sheffield, *supra* note 23, at 200.

50. *Id.* at 201.

51. *Id.*

52. *See* MODEL CODE OF EVID. R. 215 cmt. a (AM. L. INST. 1942).

53. The Uniform Rules of Evidence were originally enacted in 1947 by the National Conference of Commissioners on Uniform State Law. They attempt to achieve uniformity of the law of evidence between all states.

54. Trammel v. United States, 445 U.S. 40, 45 (1980) (quoting UNIF. R. EVID. 23(2) cmt. 2 (UNIF. L. COMM'N 1953)).

55. 358 U.S. 74 (1958).

56. *Id.*

57. *Id.* at 74.

58. *Id.*

59. *Id.*

60. *Id.* at 77.

spouse against the other.[61]

Notably, the *Hawkins* Court seemed acutely aware of the widespread criticisms of the privilege, even going so far as to acknowledge that many cases exist in which this exclusionary rule worked apparent injustice.[62] Even so, the Court was unperturbed in its belief that the privilege continued to protect marital harmony, stating that the reason "the law has refused to pit wife against husband or husband against wife . . . 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."[63]

The Court in *Hawkins* also dismissed arguments that the privilege should be modified by vesting it in the witness-spouse alone instead of the defendant-spouse, allowing the witness-spouse to voluntarily testify if they so choose.[64] In addressing the government's argument that the fact that a husband or wife voluntarily testifies against the other strongly indicates that the marriage is already beyond repair,[65] the Court noted that this is often true but that "not all marital flare-ups in which one spouse wants to hurt the other are permanent."[66] The Court felt it important that the law should not force or encourage testimony that might further inflame existing differences or alienate husband and wife.[67] The Court stated:

> The widespread success achieved by courts throughout the country in conciliating family differences is a real indication that some apparently broken homes can be saved provided no unforgivable act is done by either party. Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage.[68]

The *Hawkins* Court also looked to other jurisdictions' reluctance to abolish the rule as justification for its decision.[69] The *Hawkins* Court noted that English statutes permitted spouses to testify against each other in prosecutions for only certain crimes, and that most American states retained the rule with limited exceptions.[70]

In his concurrence, Justice Stewart questioned the justification for such

61. *Id.*
62. *Id.* at 78.
63. *Id.* at 77.
64. *Id.* at 75.
65. *Id.* at 77.
66. *Id.*
67. *Id.* at 79.
68. *Id.* at 77–78.
69. *Id.* at 78.
70. *Id.*

a privilege existing within modern jurisprudence.[71] He noted that, "[w]hen such a rule is the product of a conceptualism long ago discarded, is universally criticized by scholars, and has been qualified or abandoned in many jurisdictions, it should receive the most careful scrutiny."[72] Such scrutiny would require the court to "do more than indulge in mere assumptions, perhaps naive assumptions, as to the importance of this ancient rule to the interests of domestic tranquility."[73] However, Justice Stewart still agreed with the outcome of the case based on the facts at hand.[74]

After *Hawkins*, scholars continued to criticize the privilege, especially the decision to vest it in the defendant-spouse instead of only in the witness-spouse.[75] For example, Professor Mark Reutlinger[76] argued that if the purpose of the privilege is to avoid martial dissension, then the only spouse able to decide to testify on the basis of whether the marriage is worth saving is the *witness-spouse*.[77] Indeed, because the defendant-spouse has a strong personal interest in suppressing adverse testimony, they would likely invoke the privilege regardless of the state of the marriage.[78] Therefore, the defendant-spouse is in no position to objectively judge whether a marriage is worth saving.[79] As such, the court should not consult the defendant-spouse in determining whether justice should be served upon him.[80] Yet Professor Reutlinger recognized that even vesting the privilege in the witness-spouse has its drawbacks.[81] As the sole holder of the privilege, the witness-spouse may be tempted to blackmail or otherwise coerce the defendant-spouse by using their adverse testimony as a weapon.[82] Later, in 1980, the U.S. Supreme Court addressed this issue of whether the defendant or witness-spouse should hold this privilege.[83]

---

71. *Id.* at 81–83 (Stewart, J., concurring).

72. *Id.* at 81.

73. *Id.* at 81–82.

74. *Id.* at 83.

75. Mark Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CALIF. L. REV. 1353, 1384–85 (1973).

76. Professor Emeritus at Seattle University School of Law.

77. Reutlinger, *supra* note 75, at 1384.

78. *Id.*

79. *Id.*

80. *Id.* at 1385 (citing 8 JOHN H. WIGMORE , EVIDENCE IN TRIALS AT COMMON LAW 216–17 (McNaughton ed., rev. ed. 1961)).

81. *Id.*

82. *Id.*

83. *See* Trammel v. United States, 445 U.S. 40, 44 (1980).

B. *The Federal Abolition of Adverse Spousal Testimonial Privilege Under* Trammel v. United States

In 1980, in the seminal case *Trammel v. United States*, the United States Supreme Court finally abolished the adverse spousal testimonial privilege for defendant-spouses and vested the privilege solely in the witness-spouse.[84] In *Trammel*, Elizabeth Trammel agreed to testify against her husband, Otis Trammel, at his drug smuggling trial in exchange for immunity.[85] Otis Trammel invoked the adverse spousal testimonial privilege to stop his wife from testifying against him.[86] The trial court allowed her testimony, and Otis Trammel appealed the admission of her testimony after his conviction.[87]

In the majority opinion, Justice Burger acknowledged the incompatibility of this ancient and sexist privilege with modern society, stating that "[t]he ancient foundations for so sweeping a privilege have long since disappeared."[88] The privilege is a relic of a time when women were "regarded as chattel [and] demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being."[89] Furthermore, the privilege "contravene[s] the fundamental principle that 'the public . . . has a right to every man's evidence.'"[90] Justice Burger stated that privileges must "be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'"[91]

Justice Burger also compared the scope of the spousal testimony privilege to that of other testimonial privileges, such as the privileges between priest and penitent, attorney and client, and physician and patient, and noted that none of them swept so broadly.[92] Each of these privileges limit protection to private communications and are rooted in the need for

84. *Id.* at 40.

85. *Id.* at 42.

86. *Id.*

87. *Id.* at 43.

88. *Id.* at 52.

89. *Id.*; *see also id.* ("Chip by chip, over the years those archaic notions have been cast aside so that '[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.'" (quoting Stanton v. Stanton, 421 U.S. 7, 14–15 (1975))).

90. *Id.* at 50 (quoting United States v. Bryan, 339 U.S. 323, 331(1950)).

91. *Id.* (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

92. *Id.* at 51.

confidence and trust.[93] For example, the attorney-client privilege rests on the need for the advocate to know all information that relates to the client's representation in order for the lawyer to effectively do their job.[94] In contrast, the spousal testimonial privilege broadly excludes all adverse spousal testimony at the expense of the administration of justice, essentially making the witness-spouse a safe, unquestionable, and ready accomplice for any crime imaginable.[95]

Justice Burger also dismissed the common justification that the privilege protects marital harmony as unpersuasive.[96] In a direct rebuke of the *Hawkins* Court, he noted that when one spouse is willing to testify against the other in a criminal proceeding, their relationship is almost certainly beyond the point of repair, leaving little marital harmony left to preserve.[97] Justice Burger went one step further to say that it is possible that vesting the privilege in the defendant-spouse could actually undermine the marital relationship.[98] He reasoned that in cases such as *Trammel*, the government would be unlikely to offer a wife immunity and lenient treatment if it knew that her husband could prevent her from giving adverse testimony.[99] In this way, the privilege can have the untoward effect of permitting one spouse to escape justice at the expense of the other.[100] Thus, it does not seem conducive to the preservation of the marriage to place a wife in jeopardy solely by virtue of her husband's control over her testimony.[101]

The Court concluded that the privilege should be modified so that the witness-spouse alone can refuse to testify adversely and cannot be compelled to testify nor foreclosed from testifying.[102] Justice Burger viewed this decision as a compromise that furthered the important public interest of marital harmony without unduly burdening legitimate law enforcement needs.[103] In coming to this decision, the Court also acknowledged that a majority of the states had already moved away from allowing the defendant-spouse to prevent his or her spouse from

93. *Id.*
94. *Id.*
95. *Id.* at 51–52.
96. *Id.* at 52–53.
97. *Id.* at 52.
98. *Id.*
99. *Id.*
100. *Id.* at 52–53.
101. *Id.* at 53.
102. *Id.*
103. *Id.*

testifying.[104] At the time the opinion was published, only twenty-four states retained the privilege.[105] This was persuasive to the Court because laws involving domestic relations, such as marriage, were issues traditionally reserved to the states.[106]

In many ways, the U.S. Supreme Court's decision to abolish the privilege at the federal level was unsurprising and in line with the evolution of the jurisprudence since *Hawkins*. When the Court decided *Hawkins*, thirty-one states then allowed defendants to block spousal testimony.[107] By the time the Court decided *Trammel*, less than half still retained the rule.[108] Moreover, in 1974, the National Conference on Uniform State Laws revised its Uniform Rules of Evidence to reject the broad spousal privilege in favor of a limited privilege for confidential communications.[109] By the time of *Trammel*, several states had enacted the proposed rule, signaling an overall trend within state courts towards divesting the defendant-spouse of the privilege to bar adverse spousal testimony.[110]

In Justice Stewart's concurrence, he rejected the idea that reason and experience had vastly changed since the *Hawkins* decision in 1958.[111] As evidenced by his concurrence in *Hawkins*, Justice Stewart believed that the foundations of the privilege disappeared well before 1958 and that their disappearance did not spontaneously occur in the years between *Hawkins* and *Trammel*.[112] As such, Justice Stewart seemed reluctant to justify the *Trammel* decision based on the purported change in perception that "reason and experience" brought; instead, he emphasized that the foundations of the privilege had long since disappeared and scathingly rebuked the *Hawkins* Court for refusing to recognize it at the time.[113]

However, despite the importance of *Trammel*, the decision did not abolish the spousal testimonial privilege altogether.[114] *Trammel* simply divested it from the defendant-spouse, meaning the defendant could no

104. *Id.* at 48.

105. *Id.*

106. *Id.* at 50.

107. *Id.* at 48.

108. *Id.*

109. *See* UNIF. R. EVID. 504 (UNIF. L. COMM'N 1974).

110. *See Trammel*, 445 U.S. at 48.

111. *Id.* at 53 (Stewart, J., concurring).

112. *Id.* at 54 ("The fact of the matter is that the Court in this case simply accepts the very same arguments that the Court rejected when the Government first made them in the *Hawkins* case in 1958. I thought those arguments were valid then, and I think so now.").

113. *Id.* at 53, 54 (quoting the majority opinion at pages 46, 47, and 53).

114. *Id.* at 53 (majority opinion).

longer preclude their spouse from testifying against them.[115] As such, nothing prevents the witness-spouse from voluntarily refusing to testify against the defendant-spouse to preserve the harmony of the marriage.[116] This demonstrates that, at least to some degree, the Court still places special emphasis on the spousal relationship and wants to protect marital harmony, even if it may come at the expense of justice.

Additionally, despite *Trammel*, many state courts continued to uphold the old common law rules. For example, in 1987 the Supreme Court of Colorado patently refused to follow the *Trammel* decision.[117] It argued that, unlike the United States Supreme Court which was free "to continue the evolutionary development of testimonial privileges in federal criminal trials 'governed by the principles of the common law as they maybe be interpreted,'"[118] its role was simply to construe the language of the Colorado statute which expressly allowed the privilege.[119]

Though many state courts expressed concern over the outdated privilege, they were reluctant to overturn or modify it for this reason.[120] Many state legislatures, including Washington State,[121] had codified the common law rule within their state statutes.[122] Therefore, unlike at the federal level which only retained the privilege through common law, state courts had far less latitude to overturn or modify the privilege.[123]

II. THE SPOUSAL TESTIMONIAL PRIVILEGE IN WASHINGTON STATE

This Part examines the history of the spousal testimonial privilege in Washington State. It highlights various decisions where Washington Courts expressed significant reservations over the existence of the privilege and limited its application whilst continuing to uphold its validity. Nonetheless, statutory codification prevents state courts from

115. *Id.*

116. *Id.*

117. People v. Lucero, 747 P.2d 660, 666–67 (Colo. 1987).

118. *Id.* (quoting *Trammel*, 445 U.S. at 47 (citing FED. R. EVID. 501 advisory committee's note to 1974 enactment)).

119. *Id.* at 667 ("We find the meaning to be clear. It is also consistent with the construction that this statute received when first interpreted by this court, a construction that has not been altered in the many following years.").

120. *See, e.g.*, Rogers v. State, 189 P.3d 265, 268 (Wyo. 2008) ("*Trammel* involved application of the federal common law marital privilege. No federal statute or rule defined the privilege.").

121. WASH. REV. CODE. § 5.060.060(1) (2016).

122. Amanda H. Frost, *Updating the Marital Privileges: A Witness-Centered Rationale*, 14 WIS. WOMEN'S L.J. 1, 9 (1999).

123. *See id.*

wholesale deviation from the past position.[124] While Washington State courts are limited in the ability to change the rule absent legislative action, some reforms have evolved via judicial interpretation.

A. Statutory Exceptions to the Spousal Testimonial Privilege in Washington State

The adverse spousal testimonial privilege in Washington State provides that "[a] spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner."[125] Two key exceptions apply to the rule.[126]

Under the first exception, the privilege does not bar the witness-spouse from testifying in a "criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant."[127] Prior to 1992, Washington courts construed this exception narrowly and only applied it to crimes of personal violence by one spouse against the other.[128]

In *State v. Kephart*,[129] the Washington State Supreme Court overruled the trial court's decision to allow a wife to testify against her husband in an arson case where he burned down her barn.[130] The Court rejected the State's argument that the exception should be construed literally, holding that the statute was simply a declaration of the common law.[131] The Court noted that "[t]here is nothing more dangerous to truth than testimony prompted by conjugal affection, unless it be the echoes of a shattered home where love has flown and hatred broods expectant for the fray."[132] Further, though the Court acknowledged scholarly criticism of the privilege, it noted that courts should not lightly disregard a rule born out

---

124. *See, e.g.*, State v. Roach, 18 Wash. App. 2d 98, 120, 489 P.3d 283, 295 (2021) (Coburn, J., concurring) ("Our state, however, chose to codify the spousal privileges, thus, it is for our legislature, not the courts, to revisit and modify the statute accordingly.").

125. WASH. REV. CODE § 5.60.060(1) (2016).

126. *See id.* Other legislative exceptions to the privilege exist, including the exception providing that the privilege does not apply to involuntary civil commitment proceedings under RCW section 71.05 ("behavioral health disorders") or section 71.09 ("sexually violent predators"), but these are irrelevant to the discussions of this Comment. WASH. REV. CODE §§ 71.05, 71.09.

127. WASH. REV. CODE § 5.60.060(1) (2016).

128. *See* State v. Thompson, 88 Wash. 2d 518, 522–23, 564 P.2d 315, 317 (1977); State v. Grasser, 60 Wash. 2d 343, 374 P.2d 149 (1962); State v. Beltner, 60 Wash. 397, 111 P. 344 (1910); State v. Kephart, 56 Wash. 561, 106 P. 165 (1910).

129. 56 Wash. 561, 106 P. 165 (1910).

130. *Id.* at 562, 106 P. at 165.

131. *Id.* at 563, 106 P. at 165.

132. *Id.* at 564, 106 P. at 166.

of the practical need of truth-finding and implement a theory based on the independence of a husband and wife.[133]

However, in 1992, in *State v. Thornton*,[134] the Washington State Supreme Court overturned the *Kephart* decision and expanded the exception to apply to all crimes committed by one spouse against the other.[135] In *Thornton*, the defendant, Robert Thornton, broke into his wife's home, slashed her waterbed, and stole her suitcase.[136] At trial, the defendant moved to exclude his wife's testimony under RCW 5.60.060(1) and the *Kephart* precedent.[137] However, in this case, the Washington State Supreme Court elected to adhere to the plain language of the statute and interpreted it to mean the rule of spousal privilege could not be used to bar testimony of a spouse "against whom any crime was committed."[138] As the Court explained, "[i]t is hard to conceive of any credible justification for preventing an injured spouse from testifying in a criminal proceeding against the perpetrator. . . . [N]o legitimate purpose is served by refusing the victim of the crime the opportunity to testify against the person who committed it."[139] Importantly, the Court cited the *Trammel* decision as evidence that the public policy reasons set out in *Kephart* were based on a view of the marital institution that was "no longer accepted."[140]

Notably, however, the Court justified its decision to expand this exception based on its interpretation of the plain language of the statute. That is, because the *Kephart* Court relied solely on the common law in requiring that a crime of personal violence be involved, the Court felt comfortable modifying this purely judge-made rule.[141] Even though the *Thornton* Court relied heavily on the reasoning laid out in *Trammel*, it did not go so far as to question the legitimacy of vesting the spousal testimonial privilege in the defendant-spouse in general.[142]

Even after *Thornton,* however, lower courts continued to wrestle with the contours of this first exception to RCW 560.060(1). For example, in

133. *Id.*

134. 119 Wash. 2d 578, 835 P.2d 216 (1992).

135. *Id.*

136. *Id.* at 579, 835 P.2d at 217.

137. *Id.*

138. *Id.* at 583, 835 P.2d at 219.

139. *Id.* at 581–82, 835 P.2d at 218.

140. *Id.* at 581, 835 P.2d at 218.

141. *Id.* at 582, 835 P.2d at 218.

142. *Id.* ("Although the Court was concerned with the continued vitality of the spousal incompetency rule itself, its reasoning applies with equal force to the *Kephart* personal violence exception.").

State v. Shuffelen,[143] the Washington State Court of Appeals considered whether a defendant-spouse committed a crime against his wife by violating a no-contact order.[144] The trial court initially held that because the wife consented to the contact, she was not a victim in the "common sense" and could be barred from testifying against her husband.[145] However, the court of appeals overruled the trial court's decision, holding that this still constituted a crime committed against the wife, even if she was not harmed in the process.[146]

In 1965, the Washington State Legislature created a second exception to the privilege to address concerns over physical and sexual child abuse.[147] This exception provided that the privilege did not apply to "a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian."[148] Washington courts later expanded this exception to apply to guardians other than biological parents, including those acting in a parental role, such as a babysitter.[149]

In *State v. Martinez*,[150] the Washington State Court of Appeals applied this exception even more broadly. In this case, the defendant, Carlos Martinez, appealed his conviction for possession of depictions of a minor engaged in sexually explicit conduct and challenged the trial court's admission of his former spouse's testimony about confidential marital communications.[151] At trial, Martinez's wife testified that Martinez told the victim that he recorded tapes of her and wanted to masturbate to them and have her touch him.[152] The trial court permitted the testimony, reasoning that the exception should apply because Martinez at times acted

143. 150 Wash. App. 244, 208 P.3d 1167 (2009).

144. *Id.* at 257–59, 208 P.3d at 1173–74.

145. *Id.* at 258, 208 P.3d at 1173.

146. *Id.* at 259, 208 P.3d at 1174.

147. WASH. REV. CODE § 5.60.060(1) (1965).

148. *Id.*

149. State v. Martinez, 2 Wash. App. 2d 55, 73, 408 P.3d 721, 732 (2018) ("In light of the legislative intent to punish child abusers and protect children from further mistreatment, Washington courts have liberally interpreted 'guardian' to include a spouse acting in loco parentis, meaning functionally as a parent or guardian, even briefly."); *see also* State v. Lounsbery, 74 Wash. 2d 659, 663, 445 P.2d 1017, 1020–21 (1968) (extending exception to stepparents); State v. Waleczek, 90 Wash. 2d 745, 753, 585 P.2d 797, 800 (1978) (extending exception to temporary-custodial guardians); State v. Bouchard, 31 Wash. App. 381, 387, 639 P.2d 761, 765 (1982) (extending exception to grandparents); State v. Chenoweth, 188 Wash. App. 521, 523, 354 P.3d 13, 14 (2015) (extending exception to spouse of non-minor children).

150. 2 Wash. App. 2d 55, 408 P.3d 721 (2018).

151. *Id.* at 60, 408 P.3d at 726.

152. *Id.* at 75, 408 P.3d at 733.

as the victim's guardian.[153] Martinez asserted the spousal testimonial privilege, contending that he was not the victim's guardian and that she was just a babysitter.[154] Nonetheless, the court of appeals affirmed the trial court's decision based on the fact that the victim often came to Martinez's house uninvited, spent the night, and even went on family outings.[155]

B. Washington Courts' Growing Skepticism of the Spousal Testimonial Privilege

Washington State is one of only four states in the country that still allows the defendant-spouse to bar the witness-spouse from testifying. Despite this, Washington courts have expressed significant criticism and doubt over the continued validity of the privilege. In general, the Washington State Supreme Court has construed the language of the privilege narrowly and implemented limits to the privilege. For example, the privilege does not bar admission of a spouse's statement to justify the issuance of a search warrant of the defendant-spouse's residence.[156] The court in *State v. Osborne*[157] emphasized that "[t]he policy underlying the statutory privilege allowing the exclusion of the spouse's statements at trial is not based on the lack of reliability of the statements. A spouse's statements are sufficiently reliable to be considered in determining probable cause to issue a search warrant."[158]

Moreover, in *State v. Thorne*,[159] the Court addressed the question of whether testimony of an eavesdropper who overheard a conversation between a husband and a wife violated the testimonial privilege.[160] The Court held that the spousal testimonial privilege did not bar this kind of testimony because an overheard conversation is inherently no longer confidential.[161] Therefore, to exclude such testimony would add an

153. *Id.* at 73, 408 P.3d at 732.

154. *Id.* at 74, 408 P.3d at 732.

155. *Id.* at 74, 408 P.3d at 732–33 ("Martinez also helped A.K. learn to drive a car. A.K. ate meals with the family and 'was invited to go on outings when a babysitter was not needed.' This evidence is sufficient to support a finding that Martinez acted as A.K.'s guardian. This finding supports the trial court's decision to admit West's testimony about confidential marital communications.").

156. State v. Osborne, 18 Wash. App. 318, 322, 569 P.2d 1176, 1180 (1977) ("We hold the privilege is not applicable to the issuance of a search warrant. It is clear that evidence that would not be competent or admissible at trial may nevertheless furnish 'probable cause' for the issuance of a search warrant."); *see also* Brinegar v. United States, 338 U.S. 160 (1949) (defining probable cause).

157. 18 Wash. App. 318, 569 P.2d 1176 (1977).

158. *Id.* at 322–323, 569 P.2d at 1180 (citation omitted).

159. 43 Wash. 2d 47, 260 P.2d 331 (1953).

160. *Id.* at 57, 260 P.2d at 337.

161. *Id.*

additional layer of restriction which the statute itself does not prescribe.[162]

In *State v. Burden*,[163] the Court issued its sharpest criticisms of the spousal testimonial privilege, describing it as "lacking modern justification."[164] Aside from this criticism, the Court also held that the privilege does not bar the admission of the witness-spouse's out-of-court statements against the defendant-spouse.[165] In *Burden*, prosecutors charged the defendant with possession of stolen property and various other torts.[166] At trial, the defendant sought to exclude third-person testimony about extrajudicial, inculpatory statements made by the defendant's wife to various third parties such as her brother, her pastor, and the Kitsap County police.[167] The trial court determined that the testimonial privilege barred the admission of the testimony and granted the defendant's motion to exclude it.[168]

However, the Washington State Supreme Court reversed the lower court's decision, stating that "[a]lthough the viability of the privilege itself is not at issue, we are not convinced the marital harmony rationale justifies a construction of RCW 5.60.060(1) which excludes third person testimony of spousal extrajudicial statements."[169] The Court noted that it had previously rejected a similar argument for exclusion of third-party testimony[170] in *State v. Kosanke*.[171] The Court in *Kosanke* stated:

> [T]he court [has not gone] so far as to hold that relevant and material evidence could not be adduced merely because, in order to refute the same, the wife of a defendant might have to be called as a witness. In this case the wife of appellant was not called as a witness by respondent, nor was the attention of the jury called to her in such a way as to require objection on the part of appellant in order to preserve his rights under the statute. . . . [T]he fact that refutation of competent evidence would require the wife being a witness does not make it erroneous to adduce the testimony. *The statute [testimonial privilege] was not violated either directly or*

162. *Id.*

163. 120 Wash. 2d 371, 841 P.2d 758 (1992).

164. *Id.* at 375, 841 P.2d at 761 (quoting State v. White, 50 Wash. App. 858, 862, 751 P.2d 1202, 1204 (1988)).

165. *Id.* at 377, 841 P.2d at 761.

166. *Id.* at 372–73, 841 P.2d at 758.

167. *Id.* at 373, 841 P.2d at 759.

168. *Id.*

169. *Id.*at 376, 841 P.2d at 760.

170. *Id.* at 374, 841 P.2d at 759.

171. 23 Wash. 2d 211, 160 P.2d 541 (1945).

indirectly.[172]

However, the Court did not rest its decision solely on *Kosanke*. It also emphasized that the marital harmony rationale does not justify the exclusion of third person testimony.[173] Echoing Justice Burger in *Trammel*, the Court stated that "when a marriage has deteriorated to the point where one spouse makes statements damaging to the other, that marriage will usually proceed to its fate regardless of how the spousal privilege is applied."[174] Further, the Court noted that its holding was in accordance "with the majority of other states having statutes placing the testimonial privilege with the defendant-spouse or with both spouses."[175]

Burden also emphasized that the spousal testimonial privilege is a statutory evidentiary privilege, rather than a constitutional right.[176] As such, courts should construe it narrowly "so as to exclude the least amount of relevant evidence."[177] And yet, even this sharply critical case could not accomplish much in the way of abolishing the very foundation of the privilege. Despite all its reservations, the Court in *Burden* acknowledged that this privilege recognizes the "'natural repugnance' of having one spouse testify against the other, and prevents the testifying spouse from having to 'choose between perjury, contempt of court, or jeopardizing the marriage.'"[178] These cases demonstrate the Washington State Supreme Court's reluctance to extend the privilege beyond the strict scope of the statute. Moreover, by limiting the privilege, Washington courts slowly chipped away at the edges, bringing the state's jurisprudence closer to that iterated in the *Trammel* decision.

As Judge Coburn pointed out in her concurrence in *State v. Roach*,[179] "time and again, our legislature has recognized how the privileges has thwarted justice," however "[t]he response has been to create one exception after another."[180] Further, she noted that, "[d]espite all these exceptions, the statute continues to allow the defendant spouse to control

172. *Burden*, 120 Wash. 2d at 374, 841 P.2d at 759 (emphasis in original) (quoting *Kosanke*, 23 Wash. 2d at 217–18, 160 P.2d at 544).

173. *Id.* at 376, 841 P.2d at 760.

174. *Id.* (quoting United States v. Tsinnijinnie, 601 F.2d 1035 (9th Cir. 1979)).

175. *Id.* at 377–78, 841 P.2d at 761.

176. *Id.* at 376, 841 P.2d 758, 760.

177. *Id.*

178. *Id.* at 375, 841 P.2d at 759–60 (first quoting Teresa Virginia Bigelow, *The Marital Privileges in Washington Law: Spouse Testimony and Marital Communications*, 54 WASH. L. REV. 65, 70 (1978); and then quoting State v. Wood, 52 Wash. App. 159, 163, 758 P.2d 530, 532 (1988)).

179. 18 Wash. App. 2d 98, 489 P.3d 283 (2021).

180. *Id.* at 118, 489 P.3d at 294 (Coburn, J., concurring).

the witness spouse in all other circumstances."[181] She also acknowledged the inability of courts to modify this privilege because Washington State chose to codify the spousal privileges.[182] Therefore, "it is for our legislature, not the courts, to revisit and modify the statute accordingly."[183]

This fundamentally underscores the challenge that Washington courts face when considering the spousal testimonial privilege. On one hand, they recognize that the jurisprudence both on the federal level and in other states has long moved away from the antiquated form of the privilege. And yet, Washington courts cannot disregard the explicit statutory language and legislative intent to protect the privilege within Washington.

III. MODERN JUSTIFICATIONS FOR THE SPOUSAL TESTIMONIAL PRIVILEGE

This Part compares the two most common justifications for the continued existence of spousal testimonial privilege: the utilitarian approach and the witness-centered rationale. Traditionally, most courts and legislatures used Professor John H. Wigmore's utilitarian rationale to justify precluding testimony that might otherwise assist in the truth-gathering process.[184] However, in recent years, legal scholars have argued that courts and legislatures should focus on the perspective of the witness when considering the validity of testimonial privileges.[185] This is known as the witness-centered rationale.[186] This Part compares these two justifications and explains that the witness-centered rationale is more protective of the witness-spouse and promotes a more modern concept of marriage.

A. The Utilitarian Approach

The utilitarian approach is the most common justification for testimonial privileges.[187] First described by Professor Wigmore, it suggests that privileges are only justified if the "social benefits that come from recognizing a privilege outweigh the costs of the potential loss of

181. *Id.* at 120, 489 P.3d at 295.

182. *Id.*

183. *Id.*

184. Frost, *supra* note 122, at 15.

185. *Id.* at 33.

186. *Id.*

187. Sheffield, *supra* note 23, at 200.

information in a legal proceeding."[188] Thus, a testimonial privilege must meet four conditions:

> 1. The communications must originate in a confidence that they will not be disclosed.
> 2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
> 3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
> 4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.[189]

Wigmore's four-part test was mainly conceived to protect professional relationships such as those between lawyer and client or doctor and patient.[190] Thus, it is easy to see the flaws of applying this framework to justify spousal privileges. For example, the second factor requires that confidentiality be an essential aspect of the relationship between the parties.[191] Doctors and lawyers routinely advise their clients that any information shared is confidential.[192] These relationships simply cannot function without confidentiality: patients might hide symptoms from their doctors and clients would not share incriminating information with their lawyers.[193] But this element does not apply to marital relationships.[194] Confidentiality is not an essential element of the spousal relationship.[195] Indeed, most spouses do not even know that marital privilege exists until they are in court.[196] Therefore, this stringent framework may not provide an adequate justification for the spousal testimonial privilege.

B. The Witness-Centered Rationale

The witness-centered rationale proposes that courts and legislatures should focus on the perspective of the witness-spouse when weighing the value of spousal privileges.[197] It fundamentally protects the witness-

188. *Id.*

189. *Id.* at 201.

190. *See* Frost, *supra* note 122, at 16 & n.111.

191. *Id.* at 18.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 17.

197. *Id.* at 5–6. The witness-centered approach towards rationalizing spousal privileges was first discussed by Professor Amanda H. Frost from the University of Virginia School of Law. *Id.*

spouse's individual choice above both the defendant-spouse's interest and the prosecution's interest in gathering evidence.[198] As Professor Amanda Frost notes, "[w]itness-spouses are informed of this right, and if they choose to exercise it they need never take the stand."[199]

Importantly, this approach acknowledges and promotes marital harmony without sacrificing the autonomy of the witness-spouse. As Professor Frost states, "requiring an unwilling spouse to testify against the other asks much more than the typical law-abiding citizen can give."[200] Indeed, "[t]he lives of most husbands and wives are emotionally and financially intertwined; requiring one to testify against the other places the witness-spouse under tremendous pressure."[201] In some cases, a witness-spouse would be forced to choose between incriminating her spouse, remaining silent, or risking perjury.[202]

This approach also aligns with the doctrine of excuse.[203] The doctrine of excuse is best explained through its use in the Model Penal Code.[204] The Model Penal Code establishes that a morally wrong action should be excused when a "person of reasonable firmness" would be "unable to resist."[205] By this logic, it would be unfair to punish a witness-spouse for an act of perjury because the witness-spouse is not to blame for their predicament.[206] "An act of perjury by the witness-spouse to protect the defendant resembles any other victimless crime committed under duress, and therefore should be excused from legal penalty."[207]

Although the *Trammel* Court did not frame its decision with this witness-centered rationale, the Court undoubtedly considered the witness-spouse's individual decision-making power and allowed the spouse to protect their marriage if they chose to.[208] As the Court acknowledged, whether a witness-spouse chooses to testify likely coincides with the state of the marriage in general.[209] However, despite the *Trammel* Court's decision, its reasoning is still fundamentally rooted in the public policy of

198. *Id.*

199. *Id.* at 5.

200. *Id.* at 29.

201. *Id.*

202. *Id.*

203. *Id.* at 28–29.

204. The Model Penal Code is a model act designed to help state legislatures standardize penal laws across the United States.

205. MODEL PENAL CODE § 2.09(1) (AM. L. INST. 1984).

206. *See* Frost, *supra* note 122, at 30.

207. *Id.*

208. *See* Trammel v. United States, 445 U.S. 40, 52 (1980).

209. *Id.*

protecting the marital relationship.[210] The *Trammel* Court clearly subscribed to Professor Wigmore's utilitarian view of testimonial privileges.[211] To the Court, vesting the privilege in the witness-spouse was the best way to balance the competing interests of effective evidence collection and protecting marital harmony.[212] In contrast, Professor Frost's framework modernizes the privilege in a way that respects and honors the autonomy of the witness-spouse.[213] The witness-centered rationale eliminates the sexist institutional understanding of marriage and replaces it with one that sees each spouse as an autonomous person with the right to protect their marriage if they choose without facing punishment.

IV. WASHINGTON STATE SHOULD VEST THE PRIVILEGE IN THE WITNESS-SPOUSE BASED ON WITNESS-CENTERED RATIONALE

This Part proposes that the Washington State Legislature should amend the adverse spousal testimonial privilege by following federal precedent and vesting the privilege in the witness-spouse alone. However, the Legislature should not abolish the privilege altogether because courts should not be able to force an unwilling witness-spouse from testifying against the defendant-spouse. Section A discusses how, although abolishing the privilege altogether allows for greater ease in evidence collection, this benefit is overshadowed by a public policy desire to protect the witness-spouse's interest in safeguarding the marriage.[214] Ultimately, the Legislature should adopt a witness-centered approach towards policymaking that fully protects the rights of the witness-spouse.

Section B then explains how Washington's current model, which allows for certain exceptions to the adverse spousal testimonial privilege, is fundamentally flawed. This is not only because it still bars most testimony from the witness-spouse,[215] but also because the exceptions create an overburdensome litigation framework that forces the parties to engage in lengthy, unnecessary discussions over the technicalities of

210. *See id.*

211. *See id.* at 53.

212. *Id.*

213. Frost, *supra* note 122, at 32 ("To survive in our legal system, modern-day marital privileges must prove their relevance in a society in which the legal status of women, particularly the legal status of wives, now stands fundamentally transformed. Focusing on the witness-spouse, and giving her control over the privileges, accomplishes that goal.").

214. *See infra* section IV.A.

215. *See infra* section IV.B.2.

whether an exception applies.[216] Along with wasting judicial resources,[217] this also has the potential to further harm and traumatize the witness-spouse.

A. Abolishing the Privilege Altogether Further Endangers the Witness-Spouse and Undermines the Witness-Centered Rationale

Some critics of *Trammel* regarding the United States Supreme Court's refusal to entirely abolish the adverse testimonial privilege contend that even when the privilege is vested in the witness-spouse, it still leaves the spouse vulnerable to coercion from the defendant-spouse or their lawyer.[218] A victim of abuse may choose the "course of least resistance" and assert the privilege to avoid the danger of speaking out against their abuser or to avoid being questioned and cross-examined in front of a jury full of strangers.[219]

Indeed, some scholars have argued that courts should adopt an exception to *all* spousal privileges where a defendant is accused of a sex crime.[220] Because sex crimes are inherently heinous and damaging to the victim, they require more intense and accurate prosecution to prevent recidivism.[221] Therefore, the damage created by sex crimes upon society is greater than whatever public good may be achieved through the adverse testimonial privilege.[222] In other words, the societal need to punish people convicted of sex crimes is so great that it outweighs the witness-spouses' right or privilege to refuse to testify.

However, this line of critique is incompatible with the witness-centered rationale because it fails to understand that "forcing the witness-spouse to testify in such cases is more likely to injure the witness than aid in convicting the defendant."[223] In actuality, this is a no-win situation for an abused spouse. On one hand, if the witness-spouse perjures themselves to protect their abusive spouse, they may face imprisonment.[224] On the other hand, if the witness-spouse chooses to testify against their abuser, the defendant-spouse may be motivated to exact revenge upon the witness-

---

216. *Id.*

217. *Id.*

218. Frost, *supra* note 122, at 34.

219. *Id.*

220. *See* Jennifer Kelly, *He Said, She Said: Sex Crime Prosecutions and Spousal Privileges Under the Federal Rules of Evidence*, 86 ST. JOHN'S L. REV. 637, 659 (2012).

221. *See id.* at 642–64.

222. *Id.* at 665.

223. Frost, *supra* note 122, at 42.

224. *Id.*

spouse either after they are acquitted or after they serve their sentence.[225] At its core, the witness-centered rationale argues that policymakers should prioritize the personal autonomy of the witness-spouse above all.[226] Forcing an unwilling spouse *to* testify equally robs them of their freedom of choice as forcing them *not to* testify does.

Instead, policymakers should consider the reality that victims of abuse face.[227] The danger for domestic abuse victims is unlike that of other victims of violent crime.[228] Domestic abuse victims often fear that the abuser's actions will become more violent and lethal if the victim attempts to leave or work with law enforcement.[229] Furthermore, victims may face other social, religious, and financial pressures to protect their abuser.[230] Lawmakers must understand that, even with restraining orders, the State can do little to ensure the safety of abuse victims or prevent their abusers from retaliating against them or their families.[231] Therefore, in the absence of adequate protection, the most rational and compassionate solution is to grant the witness-spouse an exemption from legal penalty if they choose not to testify.

B. Current Washington Exceptions to the Privilege Fail to Fully Protect the Witness-Spouse

This section explains why Washington's current model of allowing exceptions to the adverse spousal testimonial privilege unnecessarily burdens litigation and does not do enough to protect the witness-spouse. This section also reexamines several previously discussed Washington cases and demonstrates how a testimonial privilege vested in the witness-spouse likely would have resulted in a more equitable outcome for the witness-spouse.

1. Inquiries into Whether One Spouse Actually Committed a Crime Against the Other Spouse Can Retraumatize Victims of Abuse

As previously mentioned, one exception to the spousal testimonial

---

225. *Id.*; *see Safety When an Abuser Gets Out of Jail*, WOMENSLAW.ORG, https://www.womenslaw.org/about-abuse/safety-tips/safety-when-abuser-gets-out-jail [https://perma.cc/BD23-MTEY].

226. *See* Frost, *supra* note 122, at 34–36.

227. *See id.*

228. *Why Do Victims Stay?*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/why-do-victims-stay [https://perma.cc/H4M7-M2ZQ].

229. *Id.*

230. *Id.*

231. *See* Frost, *supra* note 122, at 42.

privilege is that the privilege does not apply to criminal actions or proceedings for a "crime committed by one [spouse] against the other."[232] Washington courts have interpreted this exception broadly and expanded its application beyond crimes of personal violence.[233] However, despite this expansion, questions remain and litigation over the interpretation of the statutory language continues. For example, what exactly constitutes committing a crime *against* your spouse? What if the spouse was only indirectly harmed by the crime? What if the spouse was not the main victim? These questions illustrate that the exception is incompatible with the witness-centered rationale because it potentially puts a witness-spouse in a position of having to prove that they are a victim of a crime before being able to testify against their spouse.

For example, recall *State v. Shuffelen*, the Washington State Court of Appeals case that considered whether a defendant-spouse's violation of a no-contact order constituted committing a crime against his wife.[234] There, the court of appeals ultimately held that a defendant's actions still constituted a crime against his wife even when she was not technically harmed in the process.[235] However, this case is significant because it shows that even more than a decade after *State v. Thornton*, Washington courts continued to wrestle with the parameters of this exception. As long as the Legislature allows defendant-spouses to invoke the adverse testimonial privilege—no matter how many exceptions exist—defendant-spouses will try to twist their way around it. This is what we see in *Shuffelen*. Had the Legislature vested the privilege solely in the witness-spouse, the court would not even need to entertain the issue.

Looking back to *Thornton*, we can also see how vesting the privilege in the witness-spouse would have spared Ms. Thornton from having to prove that she was personally harmed by her abusive husband breaking into her home, slashing her bed, and stealing her belongings.[236] Though she was allowed to testify in the end, the very existence of the statutory privilege forced her to litigate her trauma and justify her harm simply to speak on her own behalf.

Similarly, although the rule from *State v. Kephart* that a crime against a witness-spouse must be against their physical person is now defunct, the case serves as a useful reminder that dismissing the victim-spouse's harm

232. State v. Thornton, 119 Wash. 2d 578, 580, 835 P.2d 216, 217 (1992) (quoting WASH. REV. CODE § 5.60.060(1) (2016)).

233. *Id.* at 580, 835 P.2d at 217.

234. State v. Shuffelen, 150 Wash. App. 244, 258, 208 P.3d 1167, 1173 (2009).

235. *Id.* at 259, 208 P.3d at 1174.

236. *Thornton*, 119 Wash. 2d at 579, 835 P.2d at 216–17.

is deeply embedded within the history of the testimonial privilege.[237] The victim-spouse in *Kephart* could not testify against her husband who burned down her barn because of the Court's stringent interpretation of the statutory exception.[238] Adopting the *Trammel* rule and allowing her testimony would have simply granted her the same right as any other arson victim. But more importantly, it would have saved her the pain of trying—unsuccessfully—to convince the Court that the harm she suffered met some arbitrary judicial standard.

2. *Inquiries into Who Constitutes a Parent or Guardian Turn on Arbitrary and Complicated Technicalities*

Another previously discussed exception to the privilege is that it does not apply in criminal proceedings for crimes committed against a child of whom the spouse is a parent or guardian.[239] Washington courts interpret this exception broadly and apply it to spouses acting in loco parentis, that is, functioning as a parent or guardian, even briefly.[240] However, whether a court will apply this exception turns on the particular facts and circumstances of the case.[241]

This exception forces both lawyers and judges to engage in lengthy discussions over the minute technicalities of what constitutes acting as a parent or guardian. For example, recall in *State v. Martinez*, the Washington State Court of Appeals found that the defendant-spouse did act as a guardian to the victim because she often came to his house uninvited and went on family outings with the defendant-spouse and his wife (the witness-spouse).[242] Therefore, the court allowed the witness-spouse to testify about how her husband recorded videos of the victim and masturbated to them.[243]

However, under slightly different facts, the witness-spouse might be barred from providing this useful testimony. What if, as the defendant argued at trial, the victim really was a babysitter that only came to his house to watch his children? What if she never went on outings with the family and never spent the night at their house? The court's analysis in *Martinez* seemed to turn on the fact that the victim's relationship with the defendant contained elements of care and supervision: he taught her to

237. State v. Kephart, 56 Wash. 561, 563, 106 P. 165, 165 (1910).

238. *Id.* at 561–63, 106 P. at 165–66.

239. *See* WASH. REV. CODE § 5.60.060(1) (2016).

240. *See* State v. Martinez, 2 Wash. App. 2d 55, 73, 408 P.3d 721, 732 (2018).

241. *Id.*

242. *Id.*

243. *Id.*

drive a car and she often spent the night at his house.[244] But does this mean that the court would have barred the testimony if the victim was merely an occasional babysitter? Undeniably, it seems arbitrary that the admission of the witness-spouse's testimony should turn on the particulars of the victim's relationship with the defendant.

This leaves open the possibility that spousal testimony could be barred, and child predators could potentially go unpunished if no parental or guardian-like relationship exists. If the Washington State Legislature's goal for creating the exception is to protect children from child predators, they could easily achieve a better result by simply vesting the testimonial privilege in the witness-spouse. Courts would not have to waste time and resources litigating technicalities. Additionally, there would be no risk that factual technicalities might bar vital spousal testimony needed to convict a child-predator. If this policy had existed for the *Martinez* case, the court would not have had to justify its decision to allow the witness-spouse's testimony by relying on the parental-like relationship between the defendant and victim.

CONCLUSION

Thinking back to *State v. Winnett*, the 1907 case where the court prevented Bessie Braden from testifying against her rapist-turned-husband,[245] it is impossible not to recognize how much society and modern jurisprudence has changed. Today, under the exception for crimes committed against the witness-spouse, Bessie would be able to testify on her own behalf. However, it should not be lost that the core concept that prevented her testimony in 1907 still exists. That is, the idea that marriage is a domestic institution upon which courts and government should not intrude.

It is worth questioning whether the modern conception of marriage has fundamentally strayed so far from the traditional understanding that we must reconsider *all* spousal privileges. The world in which the spousal testimonial privilege was conceived undeniably saw women as property of their husbands and marriage as a tool of control and power. Marriages today are much more equal and not even necessarily between a man and a woman. This heteronormative view of marriage and the idea of protecting the traditional family structure fails to acknowledge the existence of LGBTQ relationships.

Thus, the question remains as to how spousal privileges should evolve to fit our modern understanding of marriage. How will courts treat the

244. *Id.* at 74, 408 P.3d at 732–33.

245. State v. Winnett, 48 Wash. 93, 92 P. 904 (1907).

testimonial privilege when the spouses are two men or two women? How will both statutory and case law evolve to reimagine the very foundation of marriage? Future discussions might analyze the validity and relevance of the spousal communications privilege, which unlike the testimonial privilege, is available in both civil and criminal trials and still widely accepted and used today. So far, no states have followed, but this is a developing area of the law that may see change in the future.

As it currently stands in Washington State, the adverse spousal testimonial privilege is founded on sexist, flawed, and outdated conceptions of marriage and women. Despite the Washington State Legislature's attempt to modernize the privilege by creating exceptions for crimes against the person or child of a witness-spouse, these exemptions remain vastly under-protective, overly burdensome, and potentially re-traumatizing for witness-spouses to litigate. As such, the Legislature should follow federal precedent by vesting the privilege solely with the witness-spouse, allowing them to refuse to testify if they so choose, but depriving the defendant-spouse of the right to exclude spousal testimony. This proposed solution not only protects the public policy interest of promoting marital harmony, but it also centers the well-being of the witness-spouse as the primary interest and consideration.

Indeed, this reform is not only sensible, but necessary to put Washington State on equal footing with the federal standard and the vast majority of other states. Two decades ago, the *Trammel* Court recognized that the traditional common law approach to the adverse testimonial privilege had long become obsolete.[246] Following in those footsteps, Washington courts have valiantly chipped at the corner of the privilege, limiting the scope as much as they could and interpreting the exceptions as broadly as possible. Yet it is important to acknowledge that in the absence of legislative action, it is impossible to truly enact the necessary changes through judicial decisions alone.

246. Trammel v. United States, 445 U.S. 40 (1980).