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## Evidence—*State v. Freeman*: Adverse Marital Testimony in North Carolina Criminal Actions—Can Spousal Testimony Be Compelled?

Prior to the North Carolina Supreme Court's decision in *State v. Freeman*<sup>1</sup> adverse testimony by one spouse against another in a criminal action<sup>2</sup> was deemed incompetent and therefore inadmissible.<sup>3</sup> This common-law rule of incompetent spousal testimony prohibited the state from calling as a witness the husband or wife of any criminal defendant, with certain, limited, statutory exceptions.<sup>4</sup> In *Freeman* the court announced a major modification of the common-law rule by holding that henceforth the spouse of a criminal defendant shall be an incompetent witness for the state only when the substance of the testimony concerns a "confidential communication" between the marriage partners made during the duration of their marriage.<sup>5</sup>

The facts of the case presented the court with a compelling setting for modifying the common-law rule. Defendant Freeman was indicted for first-degree murder. Defendant's wife of three years (though she and her husband had been separated for the last two) was prepared to testify that on June 6, 1980, she saw her husband shoot and kill her brother as she and her brother sat in an automobile outside Mrs. Freeman's place of employment.<sup>6</sup> The trial court granted defendant's motion *in limine* to suppress the testimony on the ground that under the common law of North Carolina, codified at G.S. 8-57,<sup>7</sup> a spouse is incompetent to testify against a defendant-spouse in a criminal

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1. 302 N.C. 591, 276 S.E.2d 450 (1981).

2. Adverse spousal testimony in most civil actions is competent and compellable. Exceptions include actions for divorce on account of adultery and actions for criminal conversation. N.C. Gen. Stat. § 8-56 (1981).

3. The common-law rule is expressed in *State v. Hussey*, 44 N.C. 123 (1852).

4. N.C. Gen. Stat. § 8-57 (1981) provides:

The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to be cross-examined as are other witnesses. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. Nothing herein shall render any spouse competent or compellable to give evidence against the spouse in any criminal action or proceeding, except to prove the fact of marriage and facts tending to show the absence of divorce or annulment in cases of bigamy and in cases of criminal cohabitation in violation of the provisions of G.S. 14-183, and except that in all criminal prosecutions of a spouse for communicating a threat to the other spouse, or in any criminal prosecution of a spouse for trespass in or upon the separate residence of the other spouse when living separate and apart from each other by mutual consent or by court order, or for any criminal offense against a legitimate or illegitimate or adopted or foster minor child of either spouse, or for abandonment, or for neglecting to provide for the spouse's support, or the support of the children of such spouse, it shall be lawful to examine a spouse in behalf of the State against the other spouse: Provided that this section shall not affect pending litigation relating to a criminal offense against a minor child.

5. 302 N.C. at 596, 276 S.E.2d at 453.

6. *Id.* at 592-93, 276 S.E.2d at 451-52.

7. See note 4 *supra*.

proceeding.<sup>8</sup> The state immediately appealed the order pursuant to G.S. 15A-979(c),<sup>9</sup> certifying that Mrs. Freeman was the only witness who could testify to the above stated facts, and that her testimony was essential to the case.

Before modifying the rule, the court first had to hold that G.S. 8-57 did not codify the common-law rule prohibiting adverse spousal testimony in criminal trials. The statutory language on which the trial court relied was the portion of G.S. 8-57 that reads: "Nothing herein shall render any spouse competent or compellable to give evidence against the other spouse in any criminal action or proceeding . . . ."<sup>10</sup> The supreme court acknowledged that if this language did in fact codify the common-law rule, the court was without power to modify it judicially.<sup>11</sup> The court previously had addressed this precise issue in *State v. Alford*,<sup>12</sup> in which it modified the common-law rule to permit a divorced spouse to testify against her ex-husband-defendant.<sup>13</sup> There the court held that G.S. 8-57 simply provides that in all proceedings not specifically excepted in the statute, common-law rules with reference to whether one spouse is competent to testify against another are unaffected by the statute. The court observed that the portion of G.S. 8-57 quoted above differs from the portion immediately preceding it. The latter provides directly and positively that "[n]o husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage."<sup>14</sup> The court reasoned that the legislature would have used similarly definitive language had it intended to state positively that adverse spousal testimony in general was incompetent.<sup>15</sup> It concluded that by using nondefinitive language the legislature simply was expressing no opinion on this aspect of the common-law rule. Thus, absent any legislative declaration, the supreme court possesses the authority to alter judicially created common law when it deems such action necessary "in light of experience and reason."<sup>16</sup>

With the statutory impediment thereby removed, the court proceeded to reassess the continuing validity of the spousal incompetency rule. After a brief

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8. 302 N.C. at 592, 276 S.E.2d at 451.

9. N.C. Gen. Stat. § 15A-979(c) (Cum. Supp. 1981) allows an immediate appeal of a superior court order granting a motion to suppress evidence if the prosecutor certifies that the appeal is not taken for the purpose of delay and that the evidence is essential to the case.

When this section and N.C. Gen. Stat. § 7A-27(a) (1981), which provides for a direct appeal to the supreme court in capital offense cases, are considered together, it is proper to appeal a suppression order directly to the supreme court if the punishment for the charge is either death or life imprisonment. *State v. Silhan*, 295 N.C. 636, 639-40, 247 S.E.2d 902, 904 (1978).

10. 302 N.C. at 594, 276 S.E.2d at 452. See note 4 supra for full text of the provision.

11. 302 N.C. at 594, 276 S.E.2d at 452.

12. 274 N.C. 125, 161 S.E.2d 575 (1968).

13. The court in *Freeman* could have held that a two-year separation was the equivalent of divorce for purposes of the spousal privilege, but it expressly declined to do so. The reason behind the abolition of the privilege in divorced spouses could apply equally in this case—there is no true marital relationship to protect. The court declined to so hold for two reasons: (1) public policy favors encouraging reconciliation between separated spouses, and (2) the courts would be unduly burdened if required to make findings on the possibility of reconciliation in each case. 302 N.C. at 598 n.2, 276 S.E.2d at 455 n.2.

14. 274 N.C. at 129, 161 S.E.2d at 578.

15. *Id.*

16. 302 N.C. at 594, 276 S.E.2d at 452.

discussion of the historical development of the rule,<sup>17</sup> the court concluded that the doctrine prohibiting one spouse from testifying against the other remains in effect solely by force of the modern justification of encouraging free and open communication between marriage partners. It is thought that open communication might be impaired if spouses run the risk of a subsequent betrayal of confidence.<sup>18</sup> A rule that prohibits *all* adverse spousal testimony "sweeps more broadly"<sup>19</sup> than its purpose and therefore should be modified. Open communication between marriage partners could be encouraged just as effectively by a rule that limits the exclusion of testimony only if its substance concerns a confidential communication.<sup>20</sup>

The narrow holding of *Freeman* is that nonconfidential adverse spousal testimony in criminal proceedings is now competent. The court did not address the question whether such testimony is also compellable.<sup>21</sup> It is submitted, however, that because the court recognized the sole justification for the rule as existing in the policy of encouraging free and open communication in the marriage, it inadvertently may have suggested an affirmative answer to this question. This note examines two additional modern justifications for the common-law rule—maintaining peace between the marriage partners and avoiding the moral repugnance of forcing one spouse to condemn a life-long partner—both of which support a rule that makes adverse spousal testimony noncompellable.

At the outset it is important to distinguish between three separate common-law exclusionary doctrines: the privilege against adverse marital testimony in general; the disqualification of one spouse to testify on the other's behalf; and the privilege for confidential communications between husband

17. The court in one sentence surveyed the historic origins of the privilege. *Id.* This sentence, however, describes the genesis of an entirely distinct rule of common law, the disqualification of favorable spousal testimony. See text accompanying notes 29-31 *infra*.

18. 302 N.C. at 595, 276 S.E.2d at 453. The notion that open communication might be impaired if spouses were subject to the risk of betrayal is similar in rationale to the privileges for communications between attorney and client, doctor and patient, and clergyman and penitent. *Trammel v. United States*, 445 U.S. 40, 51 (1980). See *Guy v. Avery County Bank*, 206 N.C. 322, 173 S.E. 600 (1934) (attorney); *Metropolitan Life Ins. Co. v. Boddie*, 194 N.C. 199, 139 S.E. 228 (1927) (physician).

19. 302 N.C. at 595, 276 S.E.2d at 453.

20. The court stated that in determining whether a particular segment of testimony includes a "confidential communication" within the meaning of the rule adopted in this case, deference should be given to its previous decisions interpreting the term under N.C. Gen. Stat. § 8-56 (1981), the statute preserving a privilege in civil actions not to testify about "confidential communications" with one's spouse. *Id.* at 597-98, 276 S.E. 2d at 454. These cases hold that the question is whether the communication, whatever it contains, was induced by the marital relationship and prompted by the affection, confidence and loyalty engendered by such relationship. Hence, a communication made in the known presence of a third person or a communication relating to business matters which by their nature might be expected to be divulged are not protected. *Hicks v. Hicks*, 271 N.C. 204, 155 S.E.2d 799 (1967); 1 D. Stansbury, *North Carolina Evidence* § 60, at 192 (H. Brandis rev. 1973). Interestingly, the rule laid down by the court—that confidential communications between husband and wife are privileged in criminal actions—is already codified at N.C. Gen. Stat. § 8-57 (1981): "[n]o husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage."

21. Since Mrs. Freeman had volunteered her testimony, the court did not have to address the issue of compellability. See *State v. Byrd*, 21 N.C. App. 734, 736, 205 S.E.2d 326, 328 (1974), for the proposition that the privilege embodies distinct issues of competency and compellability.

and wife. Judicial confusion of these doctrines has been frequent,<sup>22</sup> and the *Freeman* court commingled all three.

The origins of the common-law privilege against adverse marital testimony in general are couched in obscurity.<sup>23</sup> The privilege appeared as early as 1580 in the case of *Bent v. Allot*<sup>24</sup> in which a husband was allowed to suppress the testimony of his wife when she was called as a witness for his opponent. While the original justification for the privilege is uncertain, Professor Wigmore suggests that the court of chancery may have drawn upon analogies to the Roman civil and the ecclesiastical law, which disqualified spouses, dependents, parents and servants.<sup>25</sup> This analogy fails, however, to explain why the common-law judges privileged only spousal testimony while permitting that of all other members of the defendant's household.<sup>26</sup> Professor Wigmore concludes that perhaps the true explanation of the rule's origin lies in a "natural and strong repugnance" toward condemning a man by admitting to the witness stand one who lived under his roof, shared the secrets of his domestic life and depended on him for sustenance.<sup>27</sup> This would tend to explain why nearly all the recorded instances of the privilege deal with the dependent wife's testimony against her husband and not vice versa.<sup>28</sup>

The disqualification of favorable spousal testimony first appeared as an established principle around 1628 when the English courts generally recognized any "interest" as a ground for disqualification.<sup>29</sup> The conclusion that the privilege arose before the disqualification is evident from the observation by the court in *Bent v. Allot* that the defendant would have been permitted to call his wife to testify on his behalf.<sup>30</sup> The disqualification branch of the rule was premised on two canons of medieval jurisprudence: first, the accused himself was prevented from testifying because of his interest in the outcome; and second, testimony from the wife was the legal equivalent of testimony from the husband, because husband and wife were considered a single legal

22. Note, Evidence—Privileged Communications Between Husband and Wife, 15 N.C.L. Rev. 282, 283 (1937).

23. 8 J. Wigmore, Evidence § 2227 (McNaughton rev. 1961).

24. 21 Eng. Rep. 50 (Ch. 1580). The privilege was engraved firmly into the common law in the early part of the seventeenth century when Lord Coke pronounced: "Note, it hath been resolved by the justices that a wife cannot be produced either against or for her husband . . . and it might be a cause of implacable discord and dissention between the husband and wife . . ." 1 E. Coke, A Commentarie upon Littleton § 6b (1628). The first recorded common-law exception to this rule came only three years later in Lord Audley's Trial, 123 Eng. Rep. 1040 (1631), in which the judges resolved that the wife could be a witness against her husband for rape upon her. This common-law exception is codified at N.C. Gen. Stat. § 8-57 (1981), reproduced at note 4 supra.

25. 2 J. Wigmore, Evidence § 600 (3d ed. 1940); 8 id. § 2227 (McNaughton rev. 1961).

26. See *State v. Parish*, 104 N.C. 679, 10 S.E. 457 (1889) (daughter against father); 8 J. Wigmore, Evidence § 2227 (McNaughton rev. 1961).

27. 8 J. Wigmore, Evidence § 2227 (McNaughton rev. 1961).

28. *Id.*

29. 2 J. Wigmore, Evidence § 600 (3d ed. 1940). Lord Coke's pronouncement in 1628 (see note 24 supra) is the first recorded utterance of the disqualification of favorable spousal testimony. Lord Coke's coupling of the privilege and the disqualification in the same sentence may have contributed to the confusion of the two doctrines. Reference to the disqualification first appeared in North Carolina in the case of *Beatty's Heirs v. [sic]*, 1 N.C. (Tay.) 104 (1799).

30. 21 Eng. Rep. at 50.

entity.<sup>31</sup>

The privilege for communications between husband and wife did not appear until the middle of the nineteenth century.<sup>32</sup> This privilege was unnecessary until the statutory modification of the rules concerning marital disqualification and privilege against adverse testimony, and this modification explains its delayed recognition.<sup>33</sup> The motivation for the privilege was to instill confidence between marital partners<sup>34</sup> by encouraging open communications.

The court in *Freeman* was confronted with only the first of these doctrines, the privilege against adverse marital testimony. In its analysis of the reasons for the privilege, however, it introduced aspects of all three rules and, not surprisingly, mingled the relevant issues. The court adopted as the historical origin of the privilege against adverse testimony the original justification for the disqualification of favorable testimony—the disqualification of the spouse based upon the defendant's interest in the outcome coupled with the marital unity concept of medieval law.<sup>35</sup> After summarily dismissing this justification as anachronistic, the court turned to the modern reason for the rule: to encourage interspousal communication<sup>36</sup>—the very motivation for the separate privilege for confidential communications<sup>37</sup>—and concluded that this

31. 2 J. Wigmore, *Evidence* § 601 (3d ed. 1940). The disqualification in criminal actions was abolished by N.C. Gen. Stat. § 8-57 (1981), which reads in pertinent part, "The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant . . ." Disqualification was the rule in federal courts until it was abolished in *Frank v. United States*, 290 U.S. 371 (1933).

32. See, e.g., *State v. Jolly*, 20 N.C. (3 & 4 Dev. & Bat.) 108 (1838); *Hester v. Hester*, 15 N.C. (4 Dev.) 228 (1833).

33. Note, *supra* note 22, at 283 n.2.

34. *State v. Jolly*, 20 N.C. (3 & 4 Dev. & Bat.) 108 (1838). Professor Wigmore argues that the policy that should lie at the foundation of every rule of privileged communications (i.e., attorney-client, doctor-patient, priest-penitent, husband-wife) can be broken down into four requirements: (1) the communications originate in confidence; (2) the confidence is essential to the relationship; (3) the relation is a proper object of encouragement by the state; and (4) the injury that would result by its disclosure is probably greater than the resulting benefit to the fact-finding process. 8 J. Wigmore, *Evidence* § 2332 (McNaughton rev. 1961). He suggests that the fourth condition is the only one subject to debate. *Id.*

The privilege for confidential marital communications is codified at N.C. Gen. Stat. § 8-57 (1981). See note 20 *supra*.

35. 302 N.C. at 594, 276 S.E.2d at 452. The North Carolina court is not alone in confusing the origins of these two separate, exclusionary rules. The United States Supreme Court in *Trammel v. United States*, 445 U.S. 40 (1980), made a similar mistake. The *Trammel* court did, however, recognize that it was dealing with two distinct rules, one a privilege vested in the defendant-spouse and the other an outright disqualification for incompetent testimony. The North Carolina court erroneously refers to both as rules of disqualification. See 302 N.C. at 594-95, 276 S.E.2d at 452.

36. 302 N.C. at 595, 276 S.E.2d at 452-53.

37. Why the court confused the justifications for these two privileges is a mystery. The supreme court clearly distinguished between the two in *State v. Alford*, 274 N.C. 125, 161 S.E.2d 575 (1968). Professor Wigmore treats the two as separate privileges, each having an entirely distinct justification. 8 J. Wigmore, *Evidence* § 2334 (McNaughton rev. 1961). Likewise, the Supreme Court in *Trammel v. United States*, which ostensibly was relied upon heavily in *Freeman*, expressly stated that its decision did not affect the "independent rule protecting confidential marital communications." 445 U.S. at 51. What is clear is that by citing the confidentiality justification as supporting the privilege against adverse marital testimony in general, the court avoided any independent analysis of the reasons for retaining the latter privilege.

purpose could be served by the narrower rule, which recognized only a privilege arising out of marital communications. This was not a very startling conclusion, given the assumed justification for the privilege. Had the court focused its inquiry on other accepted justifications for the privilege against adverse marital testimony, however, it might have reached a different result.

Since the genesis of the privilege against adverse marital testimony in the sixteenth century, two theories in favor of retaining the common-law rule frequently have been advanced by judges and commentators. The first and most often employed of the modern justifications for the privilege is the preservation of peace and harmony in the marriage relationship.<sup>38</sup> It is thought that condemning one's spouse might cause some discord between marriage partners.<sup>39</sup> The peace-and-harmony argument was given considerable attention by the United States Supreme Court in *Hawkins v. United States*<sup>40</sup> and more recently in *Trammel v. United States*.<sup>41</sup>

In *Hawkins* defendant was convicted and sentenced to five years' imprisonment by a United States district court for violating the Mann Act<sup>42</sup> by transporting a girl across state lines for immoral purposes. Over defendant's objection, the district court permitted the government to use his wife as a witness against him. In reversing the conviction the court deferred to the public policy of promoting marital harmony:

The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. . . . The wide-spread 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 a criminal proceeding would, we think, be likely to destroy almost any marriage.<sup>43</sup>

The rule laid down in *Hawkins* was later modified in *Trammel* when the Court held that the government could use defendant's spouse as a witness, but only if the testifying spouse consented. Thus, the spouse's testimony is compe-

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38. The first recorded statement of this policy reason probably was Coke's pronouncement in note 24 supra. For other early statements of the justification, see *Barker v. Dixie*, 95 Eng. Rep. 171 (1736); F. Buller, Introduction to the Law Relative to Trials at Nisi Prius (1767), at 286(a) (7th ed. R. Bridgman 1817) (1st ed. Dublin 1768).

39. Preservation of peace and harmony in the marriage, together with the marital identity concept, was also the rationale behind the common-law rule prohibiting one spouse from suing the other in tort. *Roberts v. Roberts*, 185 N.C. 566, 118 S.E. 9 (1923). In 1951 the legislature provided that husband and wife could sue each other in all tort actions. Note, Survey of Statutory Changes: Torts Between Husband and Wife, 29 N.C.L. Rev. 395 (1951). That legislative change is now codified at N.C. Gen. Stat. § 52-5 (1976).

40. 358 U.S. 74 (1958).

41. 445 U.S. 40 (1980).

42. 18 U.S.C. § 2421 (1970).

43. 358 U.S. at 77-78.

tent, but not compellable.<sup>44</sup> In so holding, however, the Court did not suggest that the preservation of marital harmony was no longer a viable justification for the privilege. On the contrary, in vesting the privilege in the testifying spouse, the Court reaffirmed its policy of furthering the "important public interest in marital harmony."<sup>45</sup> The Court overruled *Hawkins* only because it felt that when one spouse chooses to testify against the other there is little, if any, marital harmony to protect.<sup>46</sup>

The other argument supporting the privilege for adverse spousal testimony approaches the issue as a simple value judgment: because the marital relationship is based upon a deep and enduring trust between husband and wife unequalled in any other human bond, the gains to society in nurturing that trust and in avoiding the torment inherent in compelling a betrayal of that trust outweigh the burdens placed upon the fact-finding process.

One application of this principle is stated by Professor Wigmore as a "natural repugnance" in all fair-minded persons toward compelling a wife or husband to be "the means of the other's condemnation," and toward compelling the defendant to suffer "the humiliation of being condemned by the words of his intimate life partner."<sup>47</sup> Other commentators have emphasized the torment of the testifying spouse.<sup>48</sup> The argument is that the testifying spouse is presented with a painful moral dilemma—a choice between remaining loyal through perjury or betraying the marital trust by telling the truth.

Whether to ensure the emotional stability of the testifying spouse or that

44. This is currently the rule in all federal criminal proceedings. See *Labbe v. Berman*, 621 F.2d 26 (1st Cir. 1980).

45. 445 U.S. at 53.

46. *Id.* at 52. The Court cited two contemporary reports as support for its view that marital harmony deserves less protection when the spouse volunteers testimony. In 1965, California terminated the privilege in the defendant-spouse, but vested it in the witness-spouse, accepting a study commission recommendation that the "latter [was] more likely than the former to determine whether or not to claim the privilege on the basis of the probable effect on the marital relationship." *Id.* at 49-50 n.10 (citing Cal. Evid. Code Ann. §§ 970-973 (West 1966) and 1 California Law Revision Comm'n, Recommendation and Study Relating to the Marital "For or Against" Testimonial Privilege, at F-5 (1956)).

In 1972 a study group in England proposed vesting the privilege in the testifying spouse alone, on the ground that "if [the wife] is willing to give evidence . . . the law would be showing excessive concern for the preservation of marital harmony if it were to say she must not do so." 445 U.S. at 50 n.10 (citing (British) Criminal Law Rev., Eleventh Report Evidence (General) (1972) at 93).

Professor Wigmore would take the argument even further, postulating that it is absurd to assume that a normal, harmonious marriage is endangered solely by the obligation to testify unfavorably. He continues, "[It is] a curious piece of policy by which the wrongdoer's own interests are consulted in determining whether justice shall have its course against him." 8 J. Wigmore, Evidence § 2228 (McNaughton rev. 1961).

47. 8 J. Wigmore, Evidence § 2228 (McNaughton rev. 1961). Because Professor Wigmore finds the marital harmony argument unpersuasive, this value judgment is for him the sole strength of the opposition to abolishing the privilege. For other statements of the natural repugnance to condemning a man by the words of his spouse, see *Mills v. United States*, 1 Pin. 73 (Wis. 1839) ("indelible disgrace . . . and he may be the subject of the deepest mortification which a sensitive being can endure."); *Knowles v. People*, 15 Mich. 408 (1867) ("out of respect for the better feelings of humanity").

48. See 2 Abbott, *The Trial of Henry Ward Beecher* [*Tilton v. Beecher*, City of Brooklyn, N.Y.] (1875), cited in 8 J. Wigmore, Evidence § 2228 (McNaughton rev. 1961).

of the defendant, the argument is in essence that society's interest in ascertaining the truth does not outweigh the suffering inflicted upon the spouse. Professor Wigmore, after acknowledging that there is indeed a natural repugnance to condemning a man by the testimony of his intimate life-partner, concludes that the balance comes out in favor of admitting the testimony. He views the argument as nothing more than idle sentiment.<sup>49</sup> When a man has been accused of committing a crime, it is the "solemn business" of the law to find out whether he is guilty, and in this inquiry there is no room for sentiment.<sup>50</sup>

Jeremy Bentham, when presented with the dilemma of the suffering testifying spouse, took an even more dispassionate view when he proposed that inflicting such punishment upon the spouse should act as a deterrent to the prospective criminal.<sup>51</sup> According to Bentham, not only is the torment of the spouse an insufficient reason to impede our search for truth, it is also a potentially effective method of crime prevention.<sup>52</sup>

The positions taken by these two legal scholars may indeed reflect a proper value judgment—perhaps the emotional distress to either spouse is so insignificant that it is not worth protecting. On the other hand, if we assume that there is *some* psychic trauma that can be prevented by a rule excluding adverse spousal testimony, it may be that Wigmore, Bentham and others who disparage the moral reprehensibility justification place too great an emphasis on society's need to discover the truth and not enough on other equally valid objectives of a system of justice. Privilege always excludes some testimony that could aid in discovering the truth.<sup>53</sup> If courts could coerce confessions in violation of the fifth amendment, no doubt more guilty defendants would be convicted, yet our system of justice does not tolerate such inhumane violations of the human personality.<sup>54</sup> Truth-at-all-costs never has been the rule. The administration of justice was created for society, not society for the administration of justice.<sup>55</sup> If it is accepted that the trust reposed in the marriage relationship is unequalled elsewhere, reasonable persons may determine that our morals do not tolerate adverse marital testimony. Betrayal of this trust indeed may be naturally repugnant and morally reprehensible.<sup>56</sup> Dismissing

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49. 8 J. Wigmore, Evidence § 2228 (McNaughton rev. 1961).

50. Id.

51. 5 J. Bentham, Rationale of Judicial Evidence 344 (London 1827). Bentham contends that the privilege turns a man's home into a "den of thieves." Id. at 340.

52. Bentham's position is difficult to take seriously. Two of the argument's more obvious defects are its obliviousness to the difficult position of the witness-spouse and the rule's almost certainly negligible effect as a deterrent.

53. See Note, Evidence: Federal Courts: Adverse Testimony by Spouse of Accused in a Criminal Prosecution, 24 Calif. L. Rev. 472, 474 (1936), which suggests that the basis of criticism of the privilege is that the accused is thought to be guilty, while the presumption of law is that he is innocent. The damage to marital harmony and suffering of a man wrongfully accused and properly acquitted also must be considered.

54. See *Miranda v. Arizona*, 384 U.S. 436 (1966); *Spano v. New York*, 360 U.S. 315 (1959).

55. 2 Abbott, *supra* note 48, at 49-50.

56. For a defense of the privilege on moral grounds, see Note, The Search for "Reason and Experience" Under the *Funk* Doctrine, 17 U. Chi. L. Rev. 525 (1950).

this moral judgment as mere "sentiment" which must defer to the "solemn business" of ascertaining the truth misses the point.

Given that there is some public good to be gained, the question must be whether the moral reprehensibility of one spouse's condemnation of the other is sufficiently strong to overcome the burdens placed upon the fact-finding process.<sup>57</sup> The balance may not necessarily favor retention of the privilege. In the first place, if any public good is to be gained by allowing the privilege, it must be assumed that a husband and wife actually would be placed in a difficult moral dilemma when forced to testify about nonconfidential matters. Second, it is not necessarily true that the trust reposed in the marital bond is greater than that found in other close societal and familial relationships which enjoy no similar privilege.<sup>58</sup>

The strength of both the value-based moral reprehensibility argument and the marital harmony argument depends to some extent on whether or not the testifying spouse is compelled to testify. From the testifying spouse's viewpoint, the moral dilemma, real or not, is avoided by a rule that makes testimony competent, but not compellable, as in the federal rule after *Trammel*. If a spouse wishes to avoid the torment of betrayal under that rule, the alternative simply is to decline the invitation to testify.<sup>59</sup> Similarly, the state's interest in promoting marital harmony may be stronger in cases where a spouse refuses to testify. If the view of the Supreme Court in *Trammel* is accepted,<sup>60</sup> there is more harmony to protect when one spouse elects not to condemn the other.<sup>61</sup>

The *Freeman* decision has cast considerable doubt on the issue of the compellability of adverse marital testimony in North Carolina. If the court remains committed solely to the confidential communications justification for

57. See *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) and *United States v. Nixon*, 418 U.S. 683 (1974) for the proposition that because exclusionary rules and privileges contravene the fundamental principle that the public has a right to all evidence, they are permitted only in the limited circumstances of a transcendent public good.

58. See Anonymous, 123 Eng. Rep. 656 (1613) (son bound to testify against father, but wife is not).

59. The decision not to testify may not be so simple in cases like *Trammel*, where the wife is offered immunity in exchange for her testimony. This suggests that the Supreme Court's conclusion that *Trammel's* marriage probably was beyond repair may have been incorrect. It is possible that a reasonably happily married spouse would choose to testify rather than face an extended prison term.

60. See note 46 and accompanying text *supra*.

61. On the other hand, a rule making adverse spousal testimony competent but not compellable will not serve to lessen the humiliation of the defendant-spouse. In fact, assuming there is any humiliation at all, a defendant-spouse arguably would be more embarrassed when his partner chooses to testify than if the spouse were forced to do so.

Similarly, if any peace and harmony remain in the marriage of a cooperative spousal witness, it may be promoted more effectively by a rule that prohibits even noncompelled testimony. As the Court in *Hawkins* suggested, it seems probable that much more bitterness would be engendered by voluntary condemnation than by compelled testimony. 358 U.S. at 77. The Supreme Court in *Trammel* takes a contrary position. In a case where both spouses are potential defendants, the state is unlikely to offer one of them immunity and lenient treatment if it knows that the other can prevent the adverse testimony. Thus, the privilege can have the untoward effect of permitting one spouse to escape justice at the expense of the other. This situation, the Court argues, hardly seems conducive to preservation of marital harmony. 445 U.S. at 52-53.

the privilege, it would follow that a spouse's testimony about nonconfidential matters should be compellable as well as competent. The view that noncommunicative adverse spousal testimony may be compellable derives from the court's reasoning that the only modern justification for the privilege is to encourage open communication between marriage partners. The underlying rationale of the justification is that spouses will be less likely to confide in one another if they know that the confidant may someday reveal the substance of the conversation in court. Thus, in order to foster the policy, the privileged testimony must concern some communication between spouses. If the substance of the testimony is not a confidential communication (e.g., an eyewitness account of a murder), then it makes little difference whether that testimony is compelled or not. Free communication will not be inhibited at all by the fear that one's spouse may someday be forced to testify about a noncommunicative observation.<sup>62</sup> Nor will it be encouraged by the knowledge that one's spouse cannot be required to testify to such an observation. Thus, on the facts of the *Freeman* case and in any other situation where the testimony at issue does not involve interspousal communications, an extension of the court's reasoning would permit the spouse's testimony to be compelled.

The *Freeman* court was driven to reach its conclusion mainly because of its failure to recognize the distinct policy reasons behind the general privilege preventing all spousal testimony and the privilege preventing testimony about confidential matters. In a future case that raises the compulsion issue, the court should address and evaluate the competing policy interests behind the general privilege and decide which are more legitimate. It may then decide to align itself with the *Trammel* decision.<sup>63</sup> However, because the court apparently was cognizant of the new federal rule and of the rule's status in nearly every other jurisdiction,<sup>64</sup> it might be assumed that the members of the court were aware of the policy reasons supporting retention of the privilege in the testifying spouse and simply were not persuaded by them. But the fact that the court did not address either of two longstanding justifications for the rule suggests that such an assumption may not be warranted.

Promoting marital harmony and preventing the testifying spouse's moral dilemma are legitimate goals of our judicial system. The court should recognize their validity as justifications for the privilege against adverse spousal testimony in criminal actions and, when the occasion arises, judiciously weigh their importance against society's interest in ascertaining truth. If the court

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62. One's freedom to commit incriminating acts in the presence of one's spouse arguably will be inhibited by a rule that permits the state to compel testimony about those acts. It seems doubtful, however, that the state should have an interest in protecting such behavior. Unlike the protection of confidential discourse, which encourages trust between husband and wife, the protection of unlawful acts made in the presence of one's spouse appears to foster no legitimate state purpose.

63. Other jurisdictions are divided on the privilege. Seven states provide that spouses are completely incompetent to testify against each other in a criminal proceeding. Sixteen states provide a privilege against adverse spousal testimony and vest the privilege in both spouses or in the defendant-spouse alone. Nine states plus the District of Columbia vest a privilege in the witness-spouse alone. The remaining seventeen states have abolished the privilege altogether. For statutory citations, see *Trammel v. United States*, 445 U.S. 40, 48 n.9.

64. See 302 N.C. at 596 n.1, 276 S.E.2d at 453 n.1.

perceives the potential harm to the marriage and testifying spouse as particularly significant when the spouse is forced to testify, it should conclude that society is better served by a rule that makes adverse spousal testimony competent but not compellable.

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