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Child Abuse: Exception to the Anti-Marital Facts Privilege

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NOTES

CHILD ABUSE: EXCEPTION TO THE ANTI-MARITAL FACTS PRIVILEGE *United States v. Allery*, 526 F.2d 1362 (8th Cir. 1975).

The United States Court of Appeals for the Eighth Circuit, in a case of first impression among the federal courts,[1] considered whether the federally recognized anti-marital facts privilege which bars the adverse testimony of one spouse against the other should be applied where the defendant is charged with a crime against the child of either spouse. By its holding in *United States v. Allery*,[2] the court broadened the established exception to the anti-marital facts privilege, which federal courts had previously limited to offenses committed against the person or property of the testifying spouse.

The appellant had been charged with the rape and incest of his twelve-year-old daughter and was convicted of the lesser charge of attempted rape in violation of 18 U.S.C. § 1153[3] and § 12-30-01 of the North Dakota Century Code. He appealed his conviction on two grounds,[4] his major contention being that by permitting his wife to testify against him the trial court had violated the common law anti-marital facts privilege, which one spouse could invoke to bar the other spouse's adverse testimony.[5] The latter was one of three types of rules which the common law applied to the testimony of husband and wife.[6]

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1. See United States v. Shipp, 409 F.2d 33, 35 n.3 (4th Cir.), *cert. denied*, 396 U.S. 764 (1969).

2. 44 U.S.L.W. 2291 (8th Cir. Dec. 9, 1975).

3. Federal jurisdiction existed by virtue of the fact that appellant had been charged with an offense committed on an Indian reservation.

4. His first contention on appeal was that state evidentiary rules should have controlled his federal criminal prosecution and that therefore his wife's testimony was barred by North Dakota Century Code § 31-01-02 which makes one spouse incompetent to testify for or against the other spouse without the latter's consent with certain exceptions not applicable to the instant case. The court disposed of this issue summarily by pointing to Rule 26 of the Federal Rules of Criminal Procedure:

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

At the time of Allery's trial and sentencing Rule 26 controlled; however, as of July 1, 1975, the Federal Rules of Evidence govern the admissibility of evidence, competency of witnesses and privileges. See *1 D. Weinstein & M. Berger, Weinstein's Evidence* XI (1975). FED. R. EVID. 501 essentially incorporates the above-quoted language of Rule 26 which has since been deleted from that rule. See discussion *infra* at 212-13.

5. 8 J. WIGMORE, EVIDENCE §§ 2227-2245 (McNaughton rev. 1961) [hereinafter cited as 8 WIGMORE]; 97 C.J.S. *Witnesses* §§ 75-104 (1957).

6. Another rule disqualified one spouse from testifying in favor of the other one. 2 WIGMORE, EVIDENCE §§ 488 (statutes), 606-620 (3d ed. 1940) [hereinafter cited as 2

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Although the wife's incompetency to testify against her husband was firmly established at common law, all states have enacted statutes defining the scope of the privilege.[7] An exception to the privilege, based on "necessity," was recognized even at common law when the husband had been charged with a crime against the wife's person.[8] Some modern state statutes have formulated the exception so as to allow a spouse's testimony whenever one has committed a crime against the other, while others have gone further and allowed such testimony in prosecutions for offenses such as bigamy, adultery, desertion, and child abuse, as well as in abandonment and support proceedings.[9] Federal courts have likewise broadly construed the "necessity" exception.[10] However, prior to *United States v. Allery* no federal court had ever extended it to cases where the defendant was charged with a crime against a child of one of the spouses.

In October, 1971, the Advisory Committee of the Judicial Conference and the Standing Commission on Rules of Practice and Procedure submitted to the United States Supreme Court its final draft of the proposed uniform rules of evidence for use in federal courts.[11] Included in these rules was rule 505 defining the husband-wife privilege as follows:

> (a) General rule of privilege. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.
>
> (c) *Exceptions.* There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either. . . . (emphasis added)[12]

WIGMORE]; 97 C.J.S. *Witnesses* §§ 75-104 (1957). This rule has been altered or abolished in almost every state; see 2 WIGMORE, *supra*; C. MCCORMICK, EVIDENCE § 66 (2d ed. 1972); and in the federal courts by Funk v. United States, 290 U.S. 371 (1933).

The third type of privilege prevents a spouse from testifying about any confidential communication between husband and wife or, in some states, any information gained on account of the marital relation. 8 WIGMORE §§ 2332-2341; DEC. DIGEST, *Witnesses* §§ 187-195; C.J.S. *Witnesses* §§ 266-275.

7. See, Note, *Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend*, 38 VA. L. REV. 359, 362 (1952) [hereinafter cited as Note, *Competency*].

8. *E.g.*, 1 BLACKSTONE, COMMENTARIES 443 (1965); 8 WIGMORE § 2239.

9. See, Note, *Competency* 362, 365; 8 WIGMORE § 2240.

10. Wyatt v. United States, 362 U.S. 525 (1960); Shores v. United States, 174 F.2d 838 (8th Cir. 1949) (violation of the Mann Act); Herman v. United States, 220 F.2d 219 (4th Cir. 1955) (fraud against the testifying spouse); United States v. Ryno, 130 F. Supp. 85 (S.D. Cal. 1955), *aff'd on other grounds*, 232 F.2d 581 (9th Cir. 1956) (adultery).

11. S. Rep. No. 93-1277, 93d Cong., 2d Sess. (1974) reported in 1974 U.S. CODE CONG & AD. NEWS at 7052 [hereinafter cited as Senate Report].

12. 2 D. WEINSTEIN, M. BERGER, WEINSTEIN'S EVIDENCE 505-1 (1975).

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This provision was among the proposed new rules of evidence endorsed by the Supreme Court and sent by Chief Justice Burger to Congress for approval on February 5, 1973.[13] Congress chose not to adopt rule 505, deciding instead to eliminate all of the specific privilege rules submitted by the Court and substitute rule 501 of the Federal Rules of Evidence[14] which authorized the federal courts to apply testimonial privilege according to "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[15]

I. THE *Allery* COURT'S HOLDING

On the basis of its examination of the legislative history of the rejection of proposed rule 505, the *Allery* court did not find congressional disapproval of the suggested expansion but rather a desire to allow federal courts to make such substantive changes on a case-by-case basis.[16] Congress was apparently concerned primarily with the effect the proposed privilege rules would have on civil suits and on forum shopping in diversity cases.[17]

Satisfied that it had been mandated to modify federal common law privileges when "reason and experience" require it, the court proceeded to examine the policies underlying the marital privilege invoked by appellant. Although it did not dispute the validity of the privilege as a means of "fostering family peace,"[18] the majority

13. The Supreme Court has been authorized by various enabling acts (18 U.S.C. §§ 3402, 3771, 3772; 28 U.S.C. §§ 2072, 2075) to promulgate, subject to congressional approval, rules governing procedure in federal courts.

14. See Senate Report at 7051-59.

15. The full text of rule 501 reads:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

16. The relevant portion of the Senate report states:

> It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

Senate Report at 7059.

17. *See* H.R. Rep. No. 93-650, 93d Cong., 2d Sess. (1974) reported in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7082-83.

18. 526 F.2d at 1365.

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found five reasons why the privilege should no longer be applied in child abuse cases:

(1) A serious crime against a child offends not only family harmony but society as well;

(2) Parental testimony is often vital to successful prosecution of child abuse cases;

(3) The rule " 'impedes the discovery of truth in a court of law and therefore impedes as well the doing of justice' ";[19]

(4) Strong state decisional authority supports the proposition;[20]

(5) In the past fifteen years at least eleven state legislatures have seen fit to incorporate the child-abuse-neglect exception into their statutes defining the anti-marital facts privileges.[21]

Although Judge Henley, dissenting, agreed with the majority's assertion that the court had a duty to examine the policies behind federal common law privileges and to make any modifications or amendments dictated by reason, he remained unconvinced that the exception should be broadened to encompass child abuse cases. He pointed out that as recently as 1958 the Supreme Court had expressed its approval of the marital privilege fact rule and refused to limit its scope:

> There is still a widespread belief, grounded on present conditions, that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic dif-

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19. United States v. Allery, 526 F.2d at 1366 *citing* Hawkins v. United States, 358 U.S. 74, 81 (1958) (Stewart, J. concurring).

20. *See, e.g.*, Balltrip v. People, 157 Colo. 108, 401 P.2d 259 (1965) (murder by one spouse of the other spouse's child held to be equivalent of crime committed against that spouse making the husband-wife privilege inapplicable); People v. Miller, 16 Mich. 647, 168 N.W.2d 408 (1969) (mother of victim in statutory rape prosecution held to be a proper and competent witness under statute relating to husband and wife as witnesses for or against one another); State v. Kollenborn, 304 S.W.2d 855 (Mo. 1957) (in prosecution of husband for assault on their minor child, wife could testify for the state); People v. Allman, 342 N.Y.S.2d 896, 41 A.D.2d 325 (1973) (statute permitted testimony of one spouse against the other in child-abuse prosecution; however, the court said it would admit the wife's testimony even if the statute had not removed the privilege); Chamberlain v. State, 348 P.2d 280 (Wyo. 1960) (wife permitted to testify against husband in prosecution for statutory rape of their daughter because the rape of her child is a special wrong to the wife).

21. *See, e.g., Indiana,* IND. CODE § 12-3-4.155 (1971); *Iowa,* IOWA CODE ANN. § 235A.8 (1965); *Kentucky,* KY. REV. STAT. ANN. § 199.335(5) (Baldwin 1965); *Louisiana,* LA. REV. STAT. ANN. § 14:403F (1964); *Michigan,* MICH. COMP. LAWS ANN. § 600.2162 (1961); *Minnesota,* MINN. STAT. ANN. § 595.02 (1969); *Nebraska,* NEB. REV. STAT. § 28-1505 (Supp. 1974); *New Hampshire,* N.H. REV. STAT. ANN. § 169:43 (Supp. 1973); *North Dakota,* N.D. CENT. CODE § 50-25-05 (1965), repealed and supplemented by § 50-25.1-10 (1975); *South Dakota,* S.D. COMPILED LAWS ANN. § 19-2-1 (1967); *Washington,* WASH. REV. CODE ANN. § 5.60.060 (1965).

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> ferences. Under these circumstances we are unable to subscribe to the idea that several centuries should now be abandoned.[22]

However, in making this argument, Judge Henley overlooks the fact that the Supreme Court has more recently placed its stamp of approval on the child abuse exception to the marital privilege by its adoption of proposed rule 505.

Noting that Congress had directed that changes in privilege rules should be made on a case-by-case basis, Judge Henley argued that this was not a case in which compelling considerations justified expanding the exception. Not only was the victim old enough and otherwise competent to testify, but other witnesses (her three sisters) were also available and competent. All did in fact testify. The wife's testimony was mainly cumulative, highly prejudicial to the husband, and not essential to the prosecution's case. While the majority did not address this issue, it apparently felt that the strong policy reasons favoring abrogation of the privilege in child abuse cases justified expanding the "necessity" exception even in a case where arguably the wife's testimony was not crucial to successful prosectuion. Thus, unlike the dissent, the majority did not argue the facts but stressed the underlying policy objectives.

II. ANALYSIS

A. *Background*

Although 60,000 incidences of child abuse were reported to have occurred in a single year in the United States,[23] and 141,000 child neglect cases were filed in 1972,[24] such figures are said to represent no more than the "tip of the iceberg."[25] The actual incidence of child abuse and neglect[26] has been estimated to be between 665,000 and 1,675,000 per year.[27] Whatever the true figures are, it is clear that

22. United States v. Allery, 526 F.2d at 1367 *citing* Hawkins v. United States, 358 U.S. 74, 78-79 (1958).

23. *Hearings on S. 1191 Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 83d Cong., 1st Sess. at 497-505 (1973).

24. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, JUV. CT. STATISTICS 14, table 11 (1972) (table for 1972).

25. V. FONTANA, THE MALTREATED CHILD 37 (1971) [hereinafter cited as FONTANA].

26. The Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, § 3 (Jan. 31, 1974) defines "child abuse and neglect" as follows:

> [T]he physical or mental injury, sexual abuse, negligent treatment or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or well-being is harmed or threatened thereby. . . .

27. Light, *Abused and Neglected Children in America: A Study of Alternative Policies*, 43 HARV. EDUC. REV. 556, 567 (1972).

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child abuse is a major social concern. The legislative response to the problem indicates the seriousness with which it is viewed: within the brief span of 1963-1967 all fifty states as well as the District of Columbia and the Virgin Isalnds enacted "Battered Child Reporting Laws."[28] Reporting laws are designed to provide a means of informing authorities of suspected cases of abuse. Most of these statutes have provisions abrogating the husband-wife privilege in child abuse or neglect reports.[29]

According to a nationwide survey conducted by Brandeis University in 1968,[30] child abuse occurs most often at home, with biological or step-parents the abusers in 84% of the cases. The study also shows that other family members are usually present, whereas outsiders rarely are—a fact which would seen to make it important that all family members mature enough to testify be permitted to do so.

B. Evidentiary Problems

Authorities generally recognize that the prosecution of child abuse cases is plagued with particularly difficult evidentiary problems[31] due largely to the fact that this is a low-visibility crime typically involving the parent-child bond and victimizing children under three.[32] Not only do the vast majority of criminal prosecutions fail for insufficiency of evidence, but so do most civil dependency proceedings,[33] even though a lower standard of proof prevails than in criminal cases.[34] The consequences are often tragic, for in most cases the courts have no choice but to return the child to its home

28. For a listing of the statutes, *see* Paulsen, *Child Abuse Reporting Laws: The Shape of Legislation*, 67 COLUM. L. REV. 1 (1967).

29. For a listing of such statutes, *see* Fraser, *Pragmatic Alternative to Current Legislative Approaches*, 12 AM. CRIM. L. REV. 103, 112-13 (1974).

30. D. GIL, VIOLENCE AGAINST CHILDREN 134 (1970).

31. Belgrad, *The Problem of the Battered Child*, 2 MD. L.F. 37, 47 (1972); Burke, *Evidentiary Problems of Proof of Child Abuse Cases: Why Family and Juvenile Courts Fail*, 13 J. OF FAM. L. 819, 827 (1973-74) [hereinafter cited as Burke]; McKenna, *A Case Study of Child Abuse: A Former Prosecutor's View*, 12 AM. CRIM. L. REV. 165, 168 (1974) [hereinafter cited as McKenna]; Note, *An Appraisal of New York's Statutory Response to the Problem of Child Abuse*, 7 COLUM. J.L. & SOC'Y 51, 63 (1971); Comment, *Evidentiary Problems in Criminal Child Abuse Proceedings*, 63 GEO. L.J. 257, 259-63 (1974).

32. Brown, *The Battered Baby*, 76 CHI. MEDICINE No. 6 (1973), presented at the Chicago Medical Society Midwest Clinical Conference, March 11, 1972.

33. FONTANA, *supra* note 25 at 46; Burke, *supra* note 31 at 828.

34. The standard of proof in criminal cases is "beyond a reasonable doubt." 9 J. WIGMORE, EVIDENCE § 2497 (3d ed. 1940) [hereinafter cited as 9 WIGMORE]; 22A C.J.S. *Criminal Law* §§ 566-578 (1961); whereas in civil cases it is generally "a preponderance of evidence;" 9 WIGMORE § 2498; 32A C.J.S. *Evidence* §§ 1021, 1022 (1964); however, in some civil cases a more exacting measure of persuasion may be required such as "clear and convincing evidence;" In re J.Z. 190 N.W.2d 27 (N.D. 1971) (parental termination proceedings).

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where, if it has in fact been previously abused, it has a 50% chance of being killed or injured upon return.[35] An unsuccessful prosecution may not only render the court powerless to provide the "battered child" with protective services, but the "battering parent" is not given the assistance he or she may need to break the vicious cycle of abuse. Many battering parents were battered children themselves.[36]

Although direct testimonial evidence is often crucial to successful prosecution in a child abuse case, it is frequently not available. "Hostile relatives, ignorant and hostile children, and neighbors who refuse to get involved at all"[37] obstruct the fact-finding process. Even if the victim is not killed and is otherwise competent to testify, his testimony, as well as that of any siblings who witnessed the injury, is likely to be of little or no value for a variety of reasons. Children are impressionable and susceptible to parental suggestion and intimidation. In spite of past abuse suffered at the hands of their parents, they may seek to protect them and may still trust them more than the strangers (*e.g.*, the prosecutor, or social worker) sent to interview them. They may fear additional and more severe punishment.[38] Lastly, they may suffer from distorted perception because to them severe beatings and other forms of abuse are routine.[39] Putting a child on the stand who is reluctant or afraid to testify and pressing him for answers risks jury alienation. The prosecutor is thus faced with the dilemma of choosing between not using the testimony of hostile and uncooperative children even though they may be the only eyewitnesses to the crime or treading very delicately and failing to elicit meaningful information. Either approach may be fatal to the state's case.[40]

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35. FONTANA, *supra* note 25 at 46; Burke, *supra* note 31 at 828.

36. Brown, Fox, Hubbard, *Medical and Legal Aspects of the Battered Child Syndrome*, 50 CHI.-KENT L. REV. 45, 49 (1973).

37. McKenna, *supra* note 31 at 168.

38. Comment, *Evidentiary Problems in Criminal Child Abuse Proceedings*, 63 GEO. L.J. 257, 259, 260 (1974).

39. This aspect of the problem of obtaining state's witnesses is discussed by a former prosecutor who found the victim's brother and sister hostile and uncooperative even though their sister had died a slow and excruciatingly painful death at the hands of their parents.

> To them there was nothing wrong with their mother's torture of their nine-year-old sister. The children discounted their sister's screams of agony as either the natural consequence of having been 'bad' or sheer malingering. Their attitude was that she got what she deserved because she 'wouldn't listen.'

McKenna, *supra* note 31 at 169.

40. Fear of arousing jury alienation forced McKenna to abandon questioning the fourteen-year-old sister of the deceased and completely refrain from putting any of the other children on the stand. McKenna, *supra* note 31 at 169.

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Thus, unless the defendant admits that he intentionally injured the child, conviction may hinge on the testimony of a spouse who witnessed the event or has other knowledge relevant to the case. If the innocent spouse is barred from testifying by invocation of the anti-marital facts privilege, the state may be left to prove its case solely on the basis of circumstantial evidence.[41]

III. The Case Against Spousal Immunity in Child Abuse Cases

Traditionally, four reasons have been given to support the anti-marital facts privilege:

(1) Lord Coke's postulate that husband and wife "are two souls in one flesh;"[42]

(2) The public policy of promoting and preserving domestic harmony;[43]

(3) The strong repugnance against convicting a person on the testimony of one who shares the secrets of his private life and lives under the same roof with him;[44]

(4) The likelihood that the testimony will be perjurious because the husband and wife's "interests are absolutely the same, nor against the other. . . ."[45] and "their being so nearly connected, they are supposed to have such a bias on their minds that they are not to be permitted to give evidence either for or against each other."[46] As the *Allery* court wisely recognized, it cannot be seriously contended that any of these reasons outweighs society's interests in protecting children from parental abuse. Professor Wigmore has characterized Lord Coke's pronouncement as "medieval scholasticism . . . doubtful in its morality and narrow in its view of human nature."[47] Always based on a legal fiction, contemporary notions about the marital relation and the roles of the sexes deprives it of all force.

Where a parent has battered or raped his child, it is specious

41. One case described the standard for sufficiency of circumstantial evidence as follows: The facts must "form a complete chain which, in the light of the evidence as a whole, leads so directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilt. . . ." State v. DeZeler, 230 Minn. 39, 52, 41 N.W.2d 313, 322 (1950).

42. Coke, Commentary on Littleton *6b.

43. Stapleton v. Crofts, 18 Q.B. 367, 370, 118 Eng. Rep. 137, 138 (1852); Pringle v. Pringle, 59 Pa. 281, 288 (1868).

44. Knowles v. People, 15 Mich. 408, 413 (1867).

45. J. Buller, Introduction to the Law Relative to Trials at Nisi Prius 270 (1767), 286a (7th ed., Bridgman, 1817).

46. Davis v. Dinwoody, 4 Term R. 678, 679, 100 Eng. Rep. 1241 (K.B. 1792).

47. 8 Wigmore § 2228.

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to argue that preventing the innocent spouse from testifying will contribute to family harmony. "A serious crime against a child is an offense against that family harmony and to society as well."[48] To raise the shield of family harmony in order to protect a parent who has deliberately brutalized his child as to pervert the goals of the judicial system. Such behavior is as destructive to the marital relationship as injury of one spouse by the other, a situation which falls within the "necessity" exception recognized at common law.[49] It is unlikely that elimination of the anti-marital facts privilege will be found to loom heavily as a factor in our spiraling divorce rate.[50] Certainly when balanced against the benefit to society gained by successful prosecution of such cases, the alleged injury to the marital relationship seems trivial indeed.

Where the innocent spouse's testimony may be crucial to conviction "any public 'repugnance' . . . would more properly be directed at a rule of law which excluded the wife's testimony, rather than at its admittance."[51] A wrongdoer's interest in keeping secret his private life fades where the secret he seeks to conceal is that he abuses his child. It is a curious policy which would allow a spouse to batter his child and then prevent the other from testifying against him. As Professor Wigmore has aptly stated, "the law . . . does not proceed by sentiment, but aims at justice."[52] A feeling of "repugnance" is no ground for interfering with the duty of courts to do justice and ascertain the truth.

As for the supposed likelihood that the testimony will be perjurious, it would seem that a spouse who voluntarily testifies is more likely to be motivated by a desire to protect his/her child from further abuse than to protect his/her spouse from conviction. The perjury argument is based on the untenable proposition that, as a general rule, loyalty to one's spouse outweighs concern for the welfare of one's child. In such a case the interests of the spouses can no longer be held to be identical so as to make fear of perjury a valid reason for excluding a spouse's testimony. But even if the witnessing spouse is compelled to testify, the mere possibility of perjury is not

48. United States v. Allery.

49. See p. 212 *supra*.

50. The "family harmony" argument, like the other ones used to support the anti-marital facts privilege, is essentially a relic of the seventeenth century. Itmay have had force then when a special act of Parliament was required to obtain a divorce so that the more expedient course was to preserve the marriage at all costs, but it loses much of its vitality in today's world where divorce is readily available and frequently resorted to.

51. State v. Kollenborn, 304 S.W.2d 855, 860-61 (Mo. 1957).

52. 8 WIGMORE § 2228.

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a valid ground for barring that testimony altogether. The possibility of perjury exists in all cases and is insufficient to justify the harsh result often occasioned by exclusion of such evidence.

All of the public policy reasons which support the "necessity" exception when the crime is committed by one spouse against the other apply with equal force here. "The rape of the wife's child not only impairs the conjugal relation but is a special wrong to the wife and affects her directly and differently than that wrong suffered by the public in general."[53] She undoubtedly suffers as much, if not more than if her own person had been attacked. Thus, it takes no great stretch of the imagination to conclude that such an offense is a crime against the innocent spouse and on that basis include it in the established exception as a number of state courts[54] have done.

Given the widespread incidence and tragic consequences of child abuse,[55] it would seem incumbent upon the judiciary and the legislatures to devise effective means of dealing with the problem. This necessarily entails removal of evidentiary roadblocks to the courts' receipt of information and to successful prosecution. The insupportability of the traditional arguments when applied to child abuse prosecutions, coupled with the general trend to relax rules of witnesses' incompetence,[56] and the congressional directive to revise such privileges as required mandate the elimination of the anti-marital facts privilege in child abuse cases. It is hoped that the other federal courts, if given the opportunity, will follow the lead of the *Allery* court and remove this anachronistic obstruction to ascertainment of the truth.

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53. Chamberlain v. State, 348 P.2d 280, 284 (Wyo. 1960).

54. Cases cited note 20 *supra*.

55. Approximately 10% of hospitalized child abuse victims die as a result of their injuries. Others suffer permanent physical disability, mental retardation, emotional disturbances or personality disorders. In addition, the likelihood is great that those who survive will grow up into another generation of child abusers. Brown, Fox, Hubbard, *supra* note 36 at 49-50.

56. Funk v. United States, 290 U.S. 371 (1933).

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