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Protecting “Any Child:” The Use of the Confidential Marital Communications Privilege in Child Molestation Cases

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PROTECTING “ANY CHILD:” THE USE OF THE CONFIDENTIAL MARITAL COMMUNICATIONS PRIVILEGE IN CHILD MOLESTATION CASES

Naomi Harlin Goodno*

I. INTRODUCTION

II. REQUIREMENTS AND HISTORY OF THE MARITAL PRIVILEGES
   A. General Requirements of the Marital Privileges
   B. Legal History of the Marital Privileges

III. CURRENT LEGAL LANDSCAPE OF EXCEPTIONS TO THE CONFIDENTIAL MARITAL COMMUNICATIONS PRIVILEGE IN CHILD MOLESTATION CASES
   A. The Problem of the Narrow Exception of “Child of Either Spouse”
   B. The Response of the States
   C. The Response of the Federal Courts

IV. FEDERAL COURTS AND STATE LEGISLATURES SHOULD ADOPT THE “ANY CHILD” EXCEPTION TO THE CONFIDENTIAL MARITAL COMMUNICATIONS PRIVILEGE
   A. Why Adopt the “Any Child” Exception?
   B. How Federal Courts Can Adopt the “Any Child” Exception
   C. How State Legislatures Can Adopt the “Any Child” Exception
   D. Legal Theory Supports the Adoption of the “Any Child” Exception

V. CONCLUSION

   I. INTRODUCTION

   What if a husband tells his wife that he molested the neighbors’ three-year-old child at the neighborhood public park? And, what if the wife is willing to testify about her husband’s confession in a criminal trial, but the husband claims that his confession is privileged? Should the wife be allowed to testify? The answer in more than half of the states and in federal court is no.1

* Associate Professor of Law, Pepperdine University School of Law. I am deeply thankful to Judge Arthur Alarcón of the United States Court of Appeals for the Ninth Circuit for his encouragement and mentoring. I would also like to thank Bonnie Treichel and Linda Echegaray for their thorough research and editing assistance and Elizaveta Kabanova for last-minute editing suggestions.

1 Set forth in the Appendix to this Article is a chart summarizing the exceptions to the confidential marital communications privilege in cases where a spouse confesses to the other spouse that an act of child molestation was committed against a child. See also, infra Section IV of this Article.
What if a husband tells his wife that he molested her ten-year-old, mentally-handicapped sister while she was visiting for the weekend? Should the wife be allowed to testify about this confession in a criminal trial? The answer in many states and in federal court is no.²

What if a husband tells his wife that he molested their one-year-old grandson while babysitting him? Should the wife be allowed to testify about this confession? The answer in many states and federal court is no.³ What if the grandmother divorces the grandfather, should she now be allowed to testify? The answer is still no.⁴

If any of these hypotheticals are slightly changed, so that the husband confessed to his wife that he molested their own child (as opposed to a neighbor’s child, a sister-in-law, or grandchild), then the answer changes – the wife would be allowed to testify about the husband’s confession.⁵ These inconsistent laws are not just.

The confidential marital communications privilege is designed to keep conversations between spouses private in order to preserve marital harmony.⁶ There are exceptions to this privilege. The law in all jurisdictions would allow a spouse to testify about confidential communications involving a crime against the “child of either” spouse.⁷ The “child of either” spouse exception, however, is too narrow, especially in child molestation cases.

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² See, e.g., United States v. Banks, 556 F.3d 967 (9th Cir. 2009) (explaining that the exception to the confidential marital communications privilege did not extend to defendant’s confession to his wife of making a pornographic video of his grandson); see also infra Appendix to this Article.
³ See, e.g., United States v. McCollum, 58 M.J. 323 (2003) (explaining that the exception to the confidential marital communications privilege did not extend to defendant’s confession to his wife of molesting her minor, mentally-handicapped sister); see also discussion infra Appendix to this Article.
⁴ See, e.g., Pereira v. United States, 347 U.S. 1, 6 (1954) (holding that divorce does not terminate privilege for confidential marital communications made during a valid marriage).
⁵ See infra Appendix to this Article.
⁶ See United States v. White, 974 F.2d 1135, 1138 (9th Cir. 1992) (explaining that the confidential marital communications privilege fosters marital harmony).
⁷ See infra Appendix to this Article.
The purpose of this article is to show that the “child of either” spouse exception should be expanded so that defendants would not be able to invoke the confidential marital communications privilege in child molestation cases involving crimes against “any child.” If the exception is broadened to the “any child” standard, then in all of the hypotheticals set forth above the husband could not claim that his confession to his wife is protected by the confidential marital communications privilege. The first part of this article explores the history and the general requirements of the marital privileges. The second part analyzes the laws in all fifty states and the federal jurisdictions to determine what exception is being applied in child molestation cases. An Appendix to this article groups the exceptions into three categories. The third part of this article sets forth the reasons why federal courts and state legislatures should adopt the “any child” standard and the legal analysis, including proposed legislation, of how they can do so.

II. REQUIREMENTS AND HISTORY OF THE MARITAL PRIVILEGES

A. General Requirements of the Marital Privileges

The marital privileges encompass two separate privileges: (1) the “adverse spousal testimony privilege,” and (2) the “confidential marital communications privilege.” These two privileges interrelate and provide two levels of protection for communications between spouses. The adverse spousal testimony privilege governs the competency of witness, which determines whether a spouse is allowed to testify against his or her spouse. Generally, the adverse spousal testimony privilege prevents a witness-spouse from testifying adversely at trial against the defendant-spouse unless the witness-spouse chooses to testify; thus, the witness-spouse holds this privilege.9

9 Id.
The confidential marital communications privilege is broader in scope than the adverse spousal testimony privilege and protects all communications made by a spouse to a spouse during a valid marriage, regardless of the current marital status. Unlike the adverse spousal testimony privilege, the witness does not hold the marital communications privilege and, therefore, the non-testifying spouse can invoke the privilege even if the witness-spouse wants to testify about the communications. Also unlike the adverse spousal testimony privilege, the marital communications privilege survives dissolution of a marriage; thus, a defendant can invoke the privilege even if he or she is divorced from the witness. Some scholars have likened the marital communications privilege to a broader version of the attorney-client privilege (or doctor-patient privilege); the marital communications privilege is considered broader because it may be invoked by either spouse regardless of who made the communication, unlike the attorney-client privilege, which belongs to the client and can only be waived by the client.

The below chart summarizes the general requirements of each privilege:

<table>
<thead>
<tr>
<th>General Purpose</th>
<th>Adverse Spousal Testimony Privilege</th>
<th>Confidential Marital Communications Privilege</th>
</tr>
</thead>
<tbody>
<tr>
<td>“The testimonial privilege looks forward with reference to the particular marriage at hand: the privilege is meant to protect against”</td>
<td>“The marital communications privilege[,] in a sense, is broader and more abstract [than the adverse spousal testimony privilege]: it exists to insure</td>
<td></td>
</tr>
<tr>
<td><strong>Adverse Spousal Testimony Privilege</strong></td>
<td><strong>Confidential Marital Communications Privilege</strong></td>
<td></td>
</tr>
<tr>
<td>----------------------------------------</td>
<td>-------------------------------------------------</td>
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</tr>
<tr>
<td>the impact of the testimony on the marriage.</td>
<td>that spouses . . . feel free to communicate their deepest feelings to each other without fear of eventual exposure in a court of law.</td>
<td></td>
</tr>
<tr>
<td><strong>Scope</strong></td>
<td><strong>Scope</strong></td>
<td></td>
</tr>
<tr>
<td>The scope includes testimony from a spouse against a spouse on all matters in a criminal proceeding, including those that occurred before and during the marriage.</td>
<td>The scope includes testimony in a criminal or civil proceeding concerning confidential communications made between spouses.</td>
<td></td>
</tr>
<tr>
<td><strong>Holder of the Privilege</strong></td>
<td><strong>Holder of the Privilege</strong></td>
<td></td>
</tr>
<tr>
<td>The testifying spouse alone has the privilege to refuse to testify and may not be forced to testify or prevented from testifying.</td>
<td>Either spouse may assert the privilege, thus, even if one spouse is willing to testify, the other may object and thereby bar the testimony.</td>
<td></td>
</tr>
<tr>
<td><strong>Timing</strong></td>
<td><strong>Timing</strong></td>
<td></td>
</tr>
<tr>
<td>To claim the privilege, the defendant and the testifying spouse must have a valid marriage at the time the witness is called to testify.</td>
<td>The privilege attaches at the time the confidential communication was made between the spouse.</td>
<td></td>
</tr>
</tbody>
</table>

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15 United States v. Westmoreland, 312 F.3d 302, 307 n.3 (7th Cir. 2002) (quoting United States v. Lofton, 957 F.2d 476, 477 (7th Cir. 1992) (quoting United States v. Byrd, 750 F.2d 585, 590 (7th Cir. 1984)). *See also* Porter, 986 F.2d at 1018 (quoting *Byrd*, 750 F.2d at 590).  
16 *Porter*, 986 F.2d at 1018 (quoting *Byrd*, 750 F.2d at 590). *See Westmoreland*, 312 F.3d at 307 n.3 (same); *see also* Banks, 556 F.3d at 974 (“[the confidential marital] privilege exists to protect the integrity of marriages and ensure that spouses freely communicate with one another.” (internal quotes omitted)).  
17 The role of the marital privileges in civil litigation remains unclear, and is beyond the scope this article. *See, e.g.*, *In re Martenson*, 779 F.2d 461, 463 (8th Cir. 1985) (noting the issue of whether the adverse spousal testimony privilege is allowed in civil litigation).  
18 United States v. Apodaca, 522 F.2d 568, 571 (10th Cir. 1975) (holding that adverse spousal testimony privilege would apply to matters occurring prior to marriage, but denied the use of the privilege because the marriage in the case was fraudulent). *But see* United States v. Clark, 712 F.2d 299 (7th Cir. 1983) (holding that adverse spousal testimony privilege does not apply to acts before marriage).  
19 Courts have held that any communications made in the absence of a third party are presumed confidential. *Pereira*, 347 U.S. at 6 ; *Blau* v. United States, 340 U.S. 332, 333 (1951).  
20 This privilege applies to conduct and expressions “intended” as a communication. *Pereira*, 347 U.S. at 6; United States v. Bahe, 128 F.3d 1440, 1443 (10th Cir. 1997). “Though this privilege has been expanded to encompass more than mere conversations and writings, invocation of the privilege requires the presence of at least a gesture that is communicative or intended by one spouse to convey a message to another.” United States v. Espino, 317 F.3d 788, 795 (8th Cir. 2003).  
23 *Blau*, 340 U.S. at 332; *Wolfle* v. United States, 291 U.S. 7, 7 (1934); United States v. Montgomery, 384 F.3d 1050, 1058-59 (9th Cir. 2004).  
24 United States v. Wood, 924 F.2d 399, 401-02 (1st Cir. 1991).  
25 *Trammel*, 445 U.S. at 44; *Apodaca*, 522 F.2d at 571.  
26 *See, e.g.*, United States v. Termini, 267 F.2d 18, 19-20 (2d Cir. 1959) (holding that communications made after marriage are excluded from the confidential communications privilege).
Although the adverse spousal testimony privilege and confidential marriage communications privilege allow for different levels of protection, they have the same historic roots. To understand the current law and underlying theory of the marital communications privilege, and exceptions to it, one must appreciate how the current legal landscape developed.

### B. Legal History of the Marital Privileges

#### 1. Legal History of the Adverse Spousal Testimony Privilege

The United States Supreme Court and many commentaries have concluded that the adverse spousal testimony privilege originated from the common law rule of “spousal disqualification,” which provided that a wife was incompetent to testify against or for her husband. The spousal disqualification rule has medieval roots. Lord Coke observed in 1628

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27 See, e.g., Marashi, 913 F.2d at 729 (holding that the adverse spousal testimony privilege may not be asserted once the marriage ends).
28 Pereira, 347 U.S. at 6. See also United States v. Burks, 470 F.2d 432, 436 (D.C. Cir. 1972) (holding that the confidential marriage communications privilege survives a spouse’s death).
29 Trammel, 445 U.S. at 44-45.
30 Id. at 44; Hawkins v. United States, 358 U.S. 74, 75 (1958).
32 MCCORMICK ON EVIDENCE §§ 66, 78. (5th ed. 1999). Some commentators have concluded that the testimonial privilege preceded the spousal disqualification rule. See Recent Decisions, 35 MICH. L. REV. 320, 329, 329 n.5 (1936) (whereas the rule of spousal disqualification prohibited a witness-spouse from testifying favorably for the defendant-spouse, the testimony privilege prevented the witness-spouse from testifying adversely: “[t]he reason a spouse could not testify against the other was that family dissension and discord would be occasioned.”). The wife was prevented from testifying because of the privilege and not because she was considered incompetent or disqualified. Medine, supra note 31, at 523. See also Richard O. Lempert, A Right to Every Woman’s Evidence, 66 IOWA L. REV. 725, 726 (1981); The Husband-Wife Privileges of Testimonial Non-Disclosure, 56 NW. U. L. REV. 208, 209 (1961-1962). See generally 25 FED. PRAC. & PROC. EVID. § 5572 (1st ed. 2009).
that “it hath beene resolved by the Justices that a wife cannot be produced either against or for her husband.”

Spousal disqualification is based on two tenets of jurisprudence. First, parties were historically incompetent to testify on their own behalf based on the theory that their interest in the proceeding made it probable that their testimony would be unreliable. Second, a husband and wife were considered “one person,” and, thus, could not testify against each other; however, since wives were not historically recognized as having a separate legal existence from their husbands, for purposes of this theory, the husband constituted the “one person,” which meant that the wife could not testify against the husband. From these two doctrines, the rule of spousal disqualification emerged: “what was inadmissible from the lips of the defendant-husband was also inadmissible from his wife.” The justification for the spousal disqualification rule was “an argument from public policy, namely, that to allow one spouse to testify against another might cause ‘implacable discord and dissension’ and so threaten a marriage.”

33 Trammel, 445 U.S. at 44.
34 Id. (quoting 1 E. Coke, A Commentarie upon Littleton 6b (1628)). This was the first known reference to the spousal disqualification rule. See also Michael W. Mullane, Trammel v. United States: Bad History, Bad Policy, and Bad Law, 47 Me. L. Rev. 105, 128 (1995).
35 Trammel, 445 U.S. at 44; Mullane, supra note 34, at 122.
36 Trammel, 445 U.S. at 44. See generally KENNET S. BROUN ET AL., 1 MCCORMICK ON EVIDENCE § 78 (6th ed. 2006).
37 Trammel, 445 U.S. at 44; Recent Decisions, supra note 32, 329 (the rule of spousal disqualification dealt mainly with the witness-spouse testifying favorably for the defendant-spouse: “[a]gainst favorable testimony was a fear that the interest of the witness-spouse would cause discoloration of testimony, bias, and offer a temptation to perjure, creating an incompetency which waiver by neither spouse could remove.”).
38 Lempert, supra note 32, 728 (quoting 1 E. Coke, A Commentarie upon Littleton 6b (1628). Dean Wigmore presents a different argument, explaining that the privilege originated not from the spousal disqualification rule, but from the doctrine of petit treason: “[a]t that time, a wife or servant who harmed the head of household could be tried for petit treason. Consequently…to permit a wife or servant to commit petit treason indirectly by causing the husband’s death through their testimony would have been irrational.” Developments in the Law, supra note 31, at 1564-65.
The United States Supreme Court first recognized the rule of spousal disqualification in the 1839 case of *Stein v. Bowman*. In *Stein*, the Court applied the well-established rule that “[a wife] cannot testify for or against [her husband] in a suit in which he is a party, or interested.”

The spousal disqualification rule, however, began to lose force when Congress passed an act in 1878 making a defendant competent as a witness in any criminal case. The reasoning was that if a defendant was competent to testify on his own behalf, then it was hard to argue that defendant’s wife was incompetent to do so. The spousal disqualification rule was finally abolished in 1933, when the Supreme Court in *Funk v. United States* reasoned that “the exclusion of the wife’s testimony, in the face of the broad and liberal extension of the rules in respect of the competency of witnesses generally, be any longer justified, if it ever was justified, on any ground of public policy.”

Though the witness-spouse was now competent to testify on behalf of the defendant-spouse, the Court “left undisturbed the rule that either spouse could prevent the other from giving adverse testimony….The rule thus evolved into one of privilege rather than one of absolute disqualification.”

The Court reasoned that adverse testimony by a spouse might destroy a marriage, so in the 1958 case, *Hawkins v. United States*, the Court finally held that both spouses held the privilege to bar adverse testimony.

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40 Id. at 215.
42 Funk v. United States, 290 U.S. 371 (1933). *Funk* overruled two prior cases. *See* Hendrix v. United States, 219 U.S. 79, 91 (1911) (holding a wife was not a competent witness and should be excluded from testifying based on her interest in the proceeding); and Jin Fuey Moy v. United States, 254 U.S. 189, 195 (1920) (holding that a wife could not testify against her husband and noting the point “hardly require[s] mentioning.”).
43 Funk, 290 U.S. at 381.
44 Trammel, 445 U.S. at 44.
45 Hawkins, 358 U.S. at 79.
46 Id. at 78. (explaining “[a]dverse testimony given [by a spouse against another spouse] in criminal proceedings would, we think, be likely to destroy almost any marriage.”).
Although the spousal disqualification rule evolved into the adverse spousal testimony privilege, the trend in state law was to reject it because it was the non-testifying spouse that was able to exercise the privilege in order to prevent testimony.\textsuperscript{47} In 1980, the Court tackled the privilege once again in \textit{Trammel v. United States}.\textsuperscript{48} After reciting the torrid history of the privilege,\textsuperscript{49} the Court held that “‘reason and experience’ no longer justify so sweeping a rule . . . Accordingly, we conclude that the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying.”\textsuperscript{50} Thus, since \textit{Trammel}, the spousal testimony privilege belongs to the spouse who is testifying and that spouse can decide whether or not to exercise that privilege.\textsuperscript{51}

\section*{2. Legal History of the Confidential Marital Communications Privilege}

While the marital communications privilege also arose from the spousal disqualification rule,\textsuperscript{52} that spouses were incompetent to testify against each other,\textsuperscript{53} it began to distinguish itself

\textsuperscript{47} The \textit{Hawkins} Court upheld the portion of the common law rule that allowed either spouse to prevent adverse testimony by reasoning that “there is still widespread belief, grounded on present conditions, that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences.” \textit{Id.} at 76 (noting the “basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well.”).

\textsuperscript{48} \textit{Trammel}, 445 U.S. at 40.

\textsuperscript{49} The Court proceeded carefully because “the long history of the privilege suggests that it ought not to be casually set aside.” \textit{Id.} at 48.

\textsuperscript{50} \textit{Id.} at 53.

\textsuperscript{51} Before the \textit{Trammel} case, one court had held that a spouse could not bar the testimony of another spouse if the testimony involved the commission of a crime against a child of either spouse. \textit{See United States v. Allery}, 526 F.2d 1362 (8th Cir. 1975) (holding no adverse spousal testimony privilege where the charge against a husband was the attempted rape of his twelve-year-old daughter).

\textsuperscript{52} As one scholar explains:

Evidence scholars have offered four historical bases for the common law view that spouses were not competent witnesses for or against each other:

(1) \textit{The common law unity of husband and wife}. Upon marriage, the wife lost her separate identity, and the husband and wife became a legal unity, represented by the
as a separate privilege. In 1934, the United States Supreme Court expressly recognized the confidential marital communications privilege in *Wolfle v. United States.* In *Wolfle,* the defendant-husband wrote a letter to his wife by dictating its contents to a stenographer who then transcribed the letter. The Court held the communication was not privileged since it was made in the presence of a third party. The Court reasoned that “[c]ommunications between the spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged; but, wherever a communication, because of its nature or the circumstances under which it was made, was obviously not intended to be confidential, it is not a privileged communication.”

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(2) The marital identity of interest. Even apart from the spouses’ legal identity, their interest in the outcome of any lawsuit would be the same. Hence, the rationale for the party’s incompetency applied equally to the party’s spouse.

(3) The assumed bias of affection. Because of the spouses’ intimate relationship and strong feelings for each other, their testimony was deemed incredible.

(4) Public policy. There might be interference with marital harmony if the wife could be called to give unfavorable testimony against her husband. Even if the wife gave favorable testimony on direct examination, on cross-examination she may be required to give damaging testimony.

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52 *Wolfle,* 291 U.S. 7.

53 Id. at 12.

54 Id. at 17. Generally, when a third party overhears the communication, it will not be privileged. One exception to this is when the recipient-spouse voluntarily reveals the confidential communication to a third-party: “[w]here the recipient-spouse colludes with a third party to betray the trust of the communicating spouse, courts seek to protect the trust upon which the communicating spouse relied when confiding in the recipient-spouse.” Mikah K. Story, *Twenty-First Century Pillow-Talk: Applicability of the Marital Communications Privilege to Electronic Mail,* 58 S. C. L. REV. 275, 280 (2007).

55 *Wolfle,* 291 U.S. at 14 (the reasoning behind the privilege “is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails.”).
Wolfle sets the legal framework of the marital communications privilege. First, “marital communications are presumptively confidential.” Thus, the party seeking to introduce the privileged communication bears the burden to overcome this presumption. This privilege, however, can be waived if a third party is present during the communication. These requirements for the marital communications privilege was reaffirmed in 1951.

The marital privileges have elicited different reactions and degrees of support. The adverse spousal testimony privilege—grounded for the most part in the rationale of spousal incompetence—met with fierce criticism, while the confidential marital communications privilege—grounded in the rationale of privilege—has been relatively less controversial and “enjoys widespread acceptance in the marital context . . . .” Indeed, some scholars have suggested that the adverse spousal testimony privilege be completely abolished, and that the law only allow for the marital communications privilege.

58 Blau, 340 U.S. at 333.
59 Haddad v. Lockheed Cal. Corp., 720 F.2d 1454, 1456 (9th Cir. 1983); United States v. Weinberg, 439 F.2d 743, 750 (9th Cir. 1971).
60 Wolfle, 291 U.S. at 14; Pereira, 347 U.S. at 6 (explaining there is no privilege where the statements are made to, or in the presence of, third parties).
61 Blau, 340 U.S. 332-34. In Blau, the Court emphasized that the communications were presumptively confidential and the party seeking to introduce the privileged evidence has the burden to overcome the presumption that the comments were made confidentially. Id. at 333-34.
62 For example, Professor Dean Wigmore criticized the adverse spousal testimony privilege as “‘the merest anachronism in legal theory and an indefensible obstruction to truth in practice.’” Trammel, 445 U.S. at 45 (citing 8 J. Wigmore, EVIDENCE § 2228, at 221 (McNaughton rev. 1961)).
63 Regan, supra note 31, at 2057; see Barbara Gregg Glenn, The Deconstruction of the Marital Privilege, 12 PEPP. L. REV. 723, 729 (1985). This is not to say the communications privilege is without its critics. Some opponents argue the privilege impedes the truth-seeking process while others argue the privilege is unnecessary since most married couples do not know it exists. Story, supra note 56, at 280.
64 “In [the adverse spousal testimony’s] place, Wigmore and others suggested a privilege protecting only private marital communications, modeled on the privilege between priest and penitent, attorney and client, and physician and patient.” Trammel, 445 U.S. at 45 (citing 8 J. Wigmore, EVIDENCE § 2227 (McNaughton rev. 1961)). The Court explained, however: “This Court recognized just such a confidential marital communications privilege in [Wolfle and Blau] [internal citations omitted]. In neither case, however, did the Court adopt the Wigmore view that the communications privilege be substituted in place of the privilege against adverse spousal testimony.” Id. at 45 n.5.
Though historically criticism was levied against the adverse spousal testimony privilege, the 1975 proposed Federal Rules of Evidence eliminated the confidential marital communications privilege, but kept the adverse spousal testimony privilege. Congress debated the revisions and delayed enactment of the rules for two years in part because of the marital privileges. The proposal to abolish the marital communication privilege met with fierce opposition by some who saw it as key to marital harmony. Professor Charles Black wrote a letter to Congressman William L. Hungate opposing the 1975 proposed Federal Rules. He believed eliminating the communications privilege would violate marital privacy:

[T]he meaning of the Rule (made entirely clear in the Advisory Committee’s comments) is that, however intimate, however private, however embarrassing may be a disclosure by one spouse to another, or some fact discovered, within the privacies of marriage, by one spouse about another, that disclosure of fact can be wrung from the spouse under penalty of being held in contempt of court, if it is thought barely relevant to the issues in anybody’s lawsuit for breach of a contract to sell a carload of apples….It seems clear to me that this Rule trenches on the area of marital privacy so staunchly defended by the Supreme Court . . . .

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65 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 (1952).
66 Story, supra note 56, at 280. The text of the Proposed (and rejected) Federal Rule 505, stated in relevant part:

(a) General rule of privilege.
   An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.
(b) Who may claim the privilege.
   The privilege may be claimed by the accused or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of evidence to the contrary.
(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 . . . .

67 Mullane, supra note 34. See generally 25 FED. PRAC. & PROC. § 5571 (1st ed. 2009).
68 Story, supra note 56, at 310 (quoting Charles L. Black, Jr., The Marital and Physician Privileges—A Reprint of a Letter to a Congressman, 1975 DUKE L. J. 45, 46)).
Despite Professor Black’s concerns, the Advisory Committee reasoned that since most married couples were unaware of the marital communications privilege, it probably had little influence on how spouses conducted themselves inside the marriage.\textsuperscript{69}

Congress ultimately decided to abandon any evidence rule providing for a specific privilege.\textsuperscript{70} Instead, Congress adopted a single Rule, 501, which provides in relevant part that all evidentiary privileges in the federal courts would 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.”\textsuperscript{71} By adopting this single evidentiary rule, Congress “acknowledge[d] the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials” leaving the law of the marital privileges in their present state.

III. CURRENT LEGAL LANDSCAPE OF EXCEPTIONS TO THE CONFIDENTIAL MARITAL COMMUNICATIONS PRIVILEGE IN CHILD MOLESTATION CASES

\textsuperscript{69} Story, supra note 56, at 281. “The Committee believed that marriage is not primarily a verbal relationship, and therefore declining to recognize a confidential communication privilege would not have as great an impact on the institution of marriage as it would on professional relationships.” R. Michael Cassidy, Reconsidering Spousal Privileges After Crawford, 33 AM. J. CRIM. L. 339, 362 (2006).

\textsuperscript{70} The Advisory Committee proposed that Article V of the Federal Rules contain thirteen Rules relating to privilege. Congress, however, rejected this proposal because there was some concern the specific thirteen Rules included modifications to common law privileges which might be unconstitutional or raise federalism concerns. See Hous. Comm. on the Judiciary, Hous. Rep. No. 93-650 (1974), available at http://federalevidence.com/advisory-committee-notes#Rule501.

\textsuperscript{71} Rule 501 of the Federal Rules of Evidence provides in full:

\begin{quote}
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.
\end{quote}

\textbf{Fed. R. Evid. 501.}
All fifty states have codified the adverse spousal testimony privilege and the confidential marital communications privilege. The military and the District of Columbia have also codified both privileges. There are common exceptions to the privileges. First, the privilege generally does not apply in cases where the communication is about present or future criminal activity. Second, the privilege generally does not apply in cases where there are crimes against the spouse. Third, the privilege does not apply when there is a crime against the child of either spouse.


73 See generally Richard, supra note 52, 160-61.

74 See, e.g., Marashi, 913 F.2d at 729-31; United States v. Parker, 834 F.2d 408, 411 (4th Cir. 1987) (finding that the marital communications privilege does not apply to on-going or future crimes in which both spouses are participants). There is, however, a split among the Circuits with regard to this “partner in crime” exception. The Sixth and the Eighth Circuits have ruled that the “partner in crime exception” is narrowly construed to only those “communications regarding ‘patently illegal activity.’” United States v. Evans, 966 F.2d 398, 401 (8th Cir. 1992) cert. denied 506 U.S. 988 (1992) (quoting United States v. Sims, 755 F.2d 1239, 1243 (6th Cir. 1985)).

75 See, e.g., Wyatt v. United States, 362 U.S. 525, 526 (1960) (finding an exception to the adverse spousal testimony privilege where the offense charged was against the spouse).

76 See, e.g., Allery, 526 F.2d at 1367 (finding an exception to the adverse spousal testimony privilege where the offense charged was against the child of either spouse).
The remaining portion of this article examines how this third exception applies to the marital communications privilege in child molestation cases. The focus is on the confidential marital communications privilege because it is broader in scope than the adverse spousal testimony privilege. The defendant has much more power to invoke the marital communications privilege because it is the non-testifying spouse that holds the privilege for all communications made during the marriage. Thus, unlike the adverse spousal testimony privilege, it does not matter whether the spouse wants to testify as to the communications, or whether the marriage has been terminated; the non-testifying spouse can prevent the testimony.\textsuperscript{78} However, as argued in the remainder of this article, it is in precisely these cases, where child molestation has occurred, that a spouse who wants to testify should not be prevented from doing so. Many jurisdictions carve out an exception to the confidential marital communications privilege, but only in cases where the crime is against the “child of either spouse,” but this exception is too narrow.

A. The Problem of the Narrow Exception of “Child of Either Spouse”

Because the “child of either spouse” exception is too narrow, unreasonable legal analysis results. Two cases exemplify this problem. In the 2003 military case of \textit{United States v. McCollum},\textsuperscript{79} the defendant admitted to his wife that he raped her fourteen-year-old, mentally-handicapped sister who was residing with the couple for about one month during the summer.\textsuperscript{80} The defendant claimed that the statements he made to his wife about the rape were confidential marital communications and, thus, entitled to privilege.\textsuperscript{81} The military evidence rule, at that time,\textsuperscript{82} provided an exception to the privilege in “proceedings in which one spouse is charged

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{78} \textit{Wood}, 924 F.2d at 401-02.
\item \textsuperscript{79} \textit{McCollum}, 58 M.J. at 326.
\item \textsuperscript{80} \textit{Id.} at 334.
\item \textsuperscript{81} \textit{Id.} at 334-35.
\item \textsuperscript{82} After the \textit{McCollum} case, that Military Evidence Rule at issue was amended so that the exception to the confidential marital communications privilege was much broader and included “not only a biological
\end{itemize}
\end{footnotesize}
with a crime against the . . . child of either.” The government argued that the language “child of either” should include those children considered to be “de facto children.” The court disagreed and found that the intent of the drafters was that “child of either” “applies to only those situations in which a child is the biological child of one of the spouses” or “legally recognized child.” Thus, the court held that a “de facto” child did not constitute a child under the exception to the marital communications privilege. Because the defendant’s sister-in-law was not a legally recognized ward of either spouse, the court found that the defendant was correct that his wife’s testimony was protected by the marital confidential communications privilege.

child, adopted child, or ward of one of the spouses but also includes a child who is under the permanent or temporary physical custody of one of the spouses, regardless of the existence of a legal parent-child relationship.” MILITARY R. EVID. 504(d). See also Richard, supra note 52, 171 n.82.

83 McCollum, 58 M.J. at 340.
84 Id. at 340.
85 The court explained:

Given the significant social and legal policy implications of extending the privilege with respect to custodial relationships with children, we would expect such an intent to be represented in express language, rather than pressed or squeezed from the present text. Therefore, we think the better view is that ‘child of either,’ as used in M.R.E. 504(c)(2)(A), applies to only those situations in which a child is the biological child of one of the spouses, the legally recognized child, or ward of one of the spouses . . . Whether a de facto child exception to the marital communications privilege should apply to courts-marital is a legal policy question best addressed by the political and policy-making elements of the government.”

86 Id. at 340, 342.
87 Id. at 341, 343. While the court held that it was error to admit the wife’s testimony, the court found the error harmless. The court explained: “Although the qualitative nature of Appellant’s statements makes resolution of this issue a close one, we conclude that the other evidence against Appellant was sufficiently incriminating that Appellant would have been convicted even if his statements had been properly excluded.” Id. at 342-43. In the concurring opinion, Chief Judge Crawford expanded the exception to the privilege and concluded that the term “child of either” should include “de facto” children. Crawford found an overriding public policy interest which emphasized the importance of protecting children from abuse. Id. at 344 (citing Dunn v. Superior Court, 21 Cal.App.4th 721 (Cal. Ct. App. 1993) (interpreting the “child of either” language in California’s exception to the confidential marital communications privilege to include a foster child)).
In the recent 2009 Ninth Circuit case, *United States v. Banks*, the Court extended the exception to include a “de facto” child of either spouse, but even this slight extension led to unreasonable legal analysis. In *Banks*, during a search of the defendant’s home, the authorities found a pornography video of the defendant’s two-year-old grandson. The defendant was charged with criminal counts relating to “possession, production, transportation, and receipt of images depicting minors engaged in sexually explicit conduct.” During the trial, the defendant’s wife testified that the defendant had admitted to her that he made the video of their grandson. Although the defendant objected that his wife’s testimony was protected by the marital communications privilege, the trial court allowed the wife’s testimony. The defendant was found guilty; key to this ruling was the wife’s testimony.

On appeal, the Ninth Circuit noted that the confidential marital communications privilege did not apply to statements “relating to a crime where one spouse or a spouse’s children are the victims.” The Ninth Circuit explained that when there was a child “functionally equivalent” to that of the natural child, then the exception to the marital communications privilege should extend. However, in applying this narrowly drawn exception in *Banks*, the Ninth Circuit found that the exception to the marital communications privilege should not extend in this case.

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88 *Banks*, 556 F.3d 967.
89 *Id.* at 971.
90 *Id.*
91 *Id.*
92 *Id.*
93 *Banks*, 556 F.3d at 971.
94 *Id.* at 974.
95 *Id.* at 975 (“Considering the comparable familial ties, we conclude that violence against the functional equivalent of a child should be afforded the same protections as violence against the birth or step-child of a married couple.”).
96 The Ninth Circuit explained:

This is not a case in which a child was raised by grandparents and, therefore, could be said to share a parent/child relationship with those caretakers. Rather, this situation demonstrates a strong grandparent/grandchild relationship. Although such a relationship
court held that the grandson was not the functional equivalent of a natural child, despite that the
two-year-old grandson was living with the defendant for six months.\textsuperscript{97}

\textit{Banks} and \textit{McCollum} exemplify the problem with a narrowly construed exception to the
confidential marital communications privilege when the communications concern child
molestation. It is unreasonable and against public policy to limit the exception to only
communications concerning the biological child of either spouse, or even slightly broadening the
exception to include communications only concerning a \textit{de facto} child. There is no significant
difference between a crime against a biological child of a married couple, against a child visiting
the home, against a grandson, or against any child; the general welfare of all children outweigh
any benefit in keeping communications confidential in marriage that has been deeply
compromised by the confessions of a criminal and deviant sexual act.\textsuperscript{98} Nevertheless, state laws
and the federal courts are divergent in their application of exceptions to the confidential marital
communications privilege in child molestation cases.

\textbf{B. The Response of the States}

State laws concerning exceptions to the use of the confidential marital communications
privilege in child molestation cases are inconsistent. The Appendix to this Article surveys the
relevant law in all jurisdictions and divides the laws into three general categories (from
narrowest to broadest):

\textsuperscript{97} \textit{Id.} at 976.
\textsuperscript{98} \textit{Id.} at 978. Despite the finding that the district court erred in the application of the exception to the marital
communication privilege, the court found this error to be harmless. \textit{Id.} at 978. The court held that even
in the absence of the wife’s testimony that defendant admitted to making the video, the district court still
would have found the defendant to be guilty based on items shown in the video linking the video to the
defendant and based on the testimony of the other witnesses. \textit{Id.} at 977-78.
\textsuperscript{98} See \textit{infra} Section IV of this Article.
**Category 1: “Child of Either Spouse” Exception (Includes De Facto Parental Status):**

Laws which fit into this category have language similar to what was litigated in *McCollum* and *Banks*. For example, in Kansas, the confidential marital communications privilege does not apply in “in a criminal action in which one of them is charged with a crime against the person . . . of a child of either.”\(^{99}\) The “child of either spouse” is the narrowest exception because it only is applicable in cases when a case concerns the abuse and molestation of a biological child or legally recognized child of either spouse.

Fourteen states have adopted this narrow exception.\(^{100}\) Ten of these fourteen states have extended “child of either” to cover those situations in which the child is in the care or custody of either spouse and where the spouses are acting as “de facto” parents,\(^{101}\) including foster children.\(^{102}\) Four of the fourteen states in this category, however, have not yet specifically

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99 KAN. CIV. PROC. CODE ANN. § 60-428(b)(3) (West 2009).
100 ALASKA R. EVID. 505(b)(2)(A); KAN. CIV. PROC. CODE ANN. § 60-428(b)(3) (West 2009); 725 ILL. COMP. STAT. ANN. 5/115-16 (West 2010); 735 ILL. COMP. STAT. ANN. 5/8-801 (West 2010); MINN. STAT. ANN. § 595.02(A) (West 2009); N.H.R. EVID. 504; OHIO REV. CODE ANN. §§ 2317.02(d), 2945.42 (West 2009); NEV. REV. STAT. ANN. § 49.295(2)(e)(1) (West 2009); N.J. STAT. ANN. §§ 2a:84a-17(2)(b), 2a:84a-22 (West 2009); N.M. STAT. ANN. § 11-505(1) (West 2009); TENN. CODE ANN. § 24-1-201(b)(2) (West 2009); WASH. REV. CODE ANN. § 5.60.060(1) (West 2009); W. VA. CODE ANN. §§ 57-3-3, 57-3-4 (West 2009); WIS. STAT. ANN. § 905.05 (West 2009).
101 ALASKA R. EVID. 505(b)(2)(A); CAL. EVID. CODE § 972(e)(1) (West 2010); 725 ILL. COMP. STAT. ANN. 5/115-16; 735 ILL. COMP. STAT. ANN. 5/8-801; MINN. STAT. ANN. § 595.02(A); NEV. REV. STAT. ANN. § 49.295(2)(e)(1); N.J. STAT. ANN. §§ 2a:84a-17(2)(b), 2a:84a-22; N.M. STAT. ANN. § 11-505(1); TENN. CODE ANN. § 24-1-201(b)(2); WASH. REV. CODE ANN. § 5.60.060(1) (West 2009); WIS. STAT. ANN. § 905.05. See also infra Appendix to this article.
102 See, e.g., State v. Michels, 414 N.W.2d 311, 316 (Wis. Ct. App. 1987) (extending “child of either” exception to foster children); Dunn v. Cal. Sup. Ct., 21 Cal.App.4th 721 (Cal. Ct. App. 1993) (holding same); Daniels v. State, 681 P.2d 341, 345 (Alaska 1984) (finding that the adverse spousal testimony privilege rule, the language of which is analogous to Alaska’s confidential marital communications privilege rule, extended to a “foster child.”). In expanding the “child of either” exception to include foster children, one court explained:

The husband-wife privilege exists to encourage marital confidences and thereby preserve the marital relationship . . . . The “child of either” exception was created to permit prosecution for crimes committed within the family unit . . . . Such crimes would normally have no other witnesses and would go unpunished in the event the exception in the statute were not permitted to operate. In light of the purpose of the exception, we conclude that a foster child is properly included within the “child of either” category . . . . This purpose
expanded their state statutes from biological or legal “child of either” to include “de facto” parental situations. 103

**Category 2: “Child Residing in the Home” Exception (De Facto Parental Status Unnecessary):** Laws which fit into this second category are broader than the “child of either spouse” exception because it is unnecessary to establish a “de facto” parental status in order for the exception to apply. This exception extends to a child who is living in the home, but who is neither a biological child of either spouse, nor in the care or custody of either spouse. State statutes that fall into this category track language similar to that found in Utah’s statute which provides that the confidential marital communications privilege does not in apply “[i]n a proceeding in which one spouse is charged with a crime or a tort against the person or property of . . . (ii) a child of either, [or] (iii) a person residing in the household of either . . . .” 104 Eleven states and the District of Columbia fall into this category. 105

Some courts have gone to great lengths to try to extend this exception. For example, after a laborious analysis of the history of the definition of “residing,” one court interpreted the statutory term to include a child who was “visiting” the home for four days. 106 However, courts

104 UTAH R. EVID. 502(4)(c)(iii) (emphasis added).
105 ALA. R. EVID. 504(d)(3); ARK. R. EVID. 504(d); DEL. R. EVID. 504(d); D.C. CODE § 14-306(b-1)(1)(B) (2009); HAW. R. EVID. 505(c); KY. R. EVID. 504(c)(2)(c); ME. R. EVID. 504(d); N.D. R. EVID. 504(d); OKLA. STAT. ANN. TIT. 12, § 2504(d)(3) (West 2009); S.D. CODIFIED LAWS §§ 19-13-13, 19-13-15(3) (2009); UTAH R. EVID. 502(4)(c)(iii); VT. R. EVID. 504(d).
106 Munson v. State, 959 S.W.2d 391, 393 (Ark. 1998) (holding that exception to confidential marital privilege applied to child “residing” in home for a visit of four days).
should not have to apply such tortured reasoning to extend the exception; instead all state legislatures should adopt the “any child” exception.

**Category 3: “Any Child” Exception:** The “any child” exception is the broadest exception to the confidential marital communications privilege because it applies to communications involving the molestation of any child, including biological children, grandchildren, neighbors’ children, and children without any connection to the family home. State statutes that fall into this category track language similar to that found in Mississippi’s statute, which provides that there is no confidential marital communications privilege where “one spouse is charged with a crime against (1) the person of any minor child . . . .”\(^{108}\) While adoption of the “any child” exception is a relatively new trend,\(^ {109}\) there are currently twenty-five states that have adopted this broad standard.\(^ {110}\)

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\(^{107}\) This article is limited to the exceptions to the confidential marital communications privilege in child molestation cases. There are clear arguments that can be made to extend this exception to all child abuse cases, however, the analysis and theory as to why it should be extended to the broader crime of child abuse is the subject of another article. Some state statutes have been written specifically to carve out sexual abuse cases from other child abuse cases. *See, e.g.*, Pa. Cons. Stat. Ann. §§ 5913(1), (4) (West 2009) (applying an exception to the confidential marital communications privilege for sex crimes when any child is the victim of the crime, but applying the exception only to a child in the “care or custody” of either spouse when the child is a victim of all other crimes). There are, however, state statutes that extend the “any child” exception to all types of abuse cases. *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-2232(2) (2010) (carving out an exception for all “criminal action[sl.]”); Idaho R. Evid. 504(d)(1) (“In a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child.”).

\(^{108}\) *Miss. R. Evid.* 504(d).

\(^{109}\) *McCollum*, 58 M.J. at 341 (the court noted that as of 2003 “only five states ha[d] recognized an exception to the marital communications privilege for offenses against a child who is not the biological or adopted child of one of the spouses.”).

In sum, the states are split. Approximately half have adopted the narrower exceptions (categories one and two) to the confidential marital communications privilege, and the other half has recently adopted the broader “any child” standard (category three). As set forth in Section IV, the states that have adopted the narrower exception should amend their statutes to encompass the “any child” exception.

C. The Response of the Federal Courts

While the states are split, no United States Court of Appeals has adopted the “any child” exception to the confidential marital communications privilege. Indeed, only two Courts of Appeals, the Ninth and Tenth Circuits, have squarely addressed this issue, and they are split on what the standard should be. The Ninth Circuit has adopted the narrowest standard and falls into category one (child of either spouse). The Tenth Circuit falls into category two (child residing in the home).

The Tenth Circuit adopted the “child residing in the home” standard in the case United States v. Bahe. The defendant in Bahe molested an eleven-year-old female relative who was visiting the family household. At trial, the defendant’s wife attempted to provide testimony concerning how the defendant engaged in sexual intercourse. This testimony was important to the government because this was the same allegation made by the eleven-year-old victim. The

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See infra Appendix to the Article.

See supra Section III.B for further explanation of the categories.

Bahe, 128 F.3d at 1446 (applying an exception to the confidential marital communications privilege when the communication concerns a crime against a “minor child within the household.”).

Id. at 1441.

Id.
district court, however, excluded the wife’s testimony on the ground that the testimony was a protected form of communication under the marital communications privilege.\textsuperscript{116}

On appeal, the Tenth Circuit concluded that while the testimony constituted a confidential marital communication, it was subject to an exception. The court recognized that no other circuit had extended the exception beyond a case where the defendant was charged with an offense against the “child of either” spouse,\textsuperscript{117} which presented a problem in the current case because the child was a relative, not a biological child of either spouse. The court, however, held that there was no significant difference between a crime against the child of a spouse and the crime against a relative child in the home.\textsuperscript{118} The court reasoned:

We see no significant difference, as a policy matter, between a crime against a child of the married couple, against a stepchild living in the home or, as here, against an eleven-year-old relative visiting in the home. Child abuse is a horrendous crime. It generally occurs in the home, [citation omitted], and is often covered up by the innocence of small children and by threats against disclosure.\textsuperscript{119}

When this same issue was raised in the Ninth Circuit in \textit{Banks}, the court refused to adopt the \textit{Bahe} standard.\textsuperscript{120} The Ninth Circuit criticized \textit{Bahe} explaining: “No other circuit has adopted such a broad exemption to the federal marital communications privilege.”\textsuperscript{121} After rejecting the \textit{Bahe} standard, the Ninth Circuit adopted the narrowest exception, the “child of either” standard,\textsuperscript{122} and, thus, held it did not apply to communications made by the defendant to

\textsuperscript{116} \textit{Id}.
\textsuperscript{117} \textit{Id}. at 1445-46. \textit{See also White}, 974 F.2d at 1138 (holding that an exception to the marital communications privilege applied in a case where the defendant was charged with a crime against the child of his wife).
\textsuperscript{118} \textit{Bahe}, 128 F.3d at 1446.
\textsuperscript{119} \textit{Id}. \textit{See also United States v. Castillo}, 140 F.3d 874, 884-85 (10th Cir. 1998) (holding that wife of defendant charged with sexual abuse of his daughters fell within exception to marital communications privilege for spousal testimony relating to abuse of minor child within the household) (\textit{citing Bahe}, 128 F.3d at 1441)).
\textsuperscript{120} \textit{Banks}, 556 F.3d at 975 n.3.
\textsuperscript{121} \textit{Id}.
\textsuperscript{122} \textit{White}, 974 F.2d at 1138.
his wife concerning the molestation of their grandson. Even though the Bahe standard is somewhat broader than the standard adopted in Banks, both Circuits rejected adopting the broadest “any child” exception.

While the Ninth and Tenth Circuits are the only Federal Courts of Appeal that have addressed this issue, there are a few other cases on point from district courts in other Circuits. One district court in the Fifth Circuit has attempted to extend the exception to the “any child” standard, but it remains to be seen if the Fifth Circuit will adopt the lead of this district court. The next section sets forth the analysis for how the Fifth Circuit, and all other federal Courts of Appeals, should analyze the issue.

IV. FEDERAL COURTS AND STATE LEGISLATURES SHOULD ADOPT THE “ANY CHILD” EXCEPTION TO THE CONFIDENTIAL MARITAL COMMUNICATIONS PRIVILEGE

A. Why Adopt the “Any Child” Exception?

What is unique about child molestation cases as opposed to murder, for example, which leads to the conclusion that federal courts and state legislatures should adopt the broad “any child” exception to the confidential marital communications privilege? This section answers this

123 Banks, 556 F.3d at 975; see also, supra, Section III.A.
125 In United States v. Martinez, the wife attempted to claim privilege over communications she made to her husband concerning abuse of her children. United States v. Martinez, 44 F. Supp. 2d 835 (W.D. Tex. 1999). The court held that these communications were not privileged. Id. Although the issue before the Martinez court concerned the abuse of the “child of either” spouse, the holding of the court was broader, adopting the any child standard:

[I]n a case where one spouse is accused of abusing minor children, society’s interest in the administration of justice far outweighs its interest in protecting whatever harmony or trust may at that point still remain in the marital relationship. ‘Reason and experience’ dictate that the marital communications privilege should not apply to statements relating to a crime where the victim is a minor child.

Id. at 837.
question and then sets forth the legal analysis for how federal courts and state legislatures can justify adopting the “any child” standard. There are four reasons why the “any child” standard should be adopted.

1. Child molestation is a unique crime in that it is often hard to prosecute due to the lack of witness testimony and physical evidence.

The United States Supreme Court has recognized that child abuse is “one of the most difficult crimes to detect and prosecute.” There are a number of reasons why child molestation, in particular, is difficult to prosecute. First, there are often no witnesses to child sexual abuse except the child-victim. If the child is young, like the two-year-old grandson in the Banks case, then the child may be developmentally unable to testify. Certainly, in the case of an infant, it would be impossible for the child to testify. Even if the child is old enough to testify, the courtroom experience can be extremely traumatic for the child. This is often increased by the close proximity of the defendant in the courtroom, and is “particularly acute

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128 Ritchie, 480 U.S. at 60 (finding that child abuse is hard to prosecute “in large part because there often are no witnesses except the victim.”); see also Sopher, supra note 126, 643.
129 Banks, 556 F.3d at 975-76 (holding that a two-year old grandson was not a “child of either spouse” for purposes of the exception to the confidential marital communications privilege); see also supra Section IV.A of this Article addressing Banks.
130 Sopher, supra note 126, 644; see also State v. Jones, 112 Wash. 2d 488, 494 (1989) (stating that children are ineffective witnesses because they are often “intimidated and confused by courtroom processes, embarrassed at having to describe sexual matters, and uncomfortable in their role as accuser of a defendant who may be a parent, other relative or friend.”); In re Nicole V., 71 N.Y.2d at 117 (asserting that victims are generally reluctant to testify in child sexual abuse cases); NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN AND FEDERAL BUREAU OF INVESTIGATION, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS 29 (1992) (explaining that pedophiles will sometimes use pornography of the
when the abuser is a parent.Traumatized child-victims can be afraid to tell the entire truth and also can have blurred memories, which, in turn, raises concern of witness credibility. Because child sexual abuse generally occurs in secret, it is difficult to find witnesses. Thus, to

victim to blackmail the child to ensure that the child will keep the sexual abuse a secret); Michelle Ann Scott, Self-Defense and the Child Parricide Defendant: Should Courts Make a Distinction Between the Battered Woman and the Battered Child?, 44 Drake L. Rev. 351, 363 (1996) (explaining that in cases of child abuse generally, “abused children develop the delusion that their parents are actually good. Such children assume blame for the abuse, rather than attributing it to the parent.”); Peter T. Wendel, The Case Against Plea Bargaining Child Sexual Abuse Charges: “Déjà vu All Over Again”, 64 Mo. L. Rev. 317, 322 (1999) (describing the trial in child sexual abuse cases as “little more than a ‘swearing match’ between a nervous, embarrassed thirteen-year-old boy and [ ], a successful, well-liked prominent sports figure backed by a group of players’ parents.”).

131 Ritchie, 480 U.S. at 60.

132 Sopher, supra note 126, 644-45; see also Jones, 112 Wash. 2d at 494 (stating that “children’s memories of abuse may have dimmed with the passage of time.”); see also La Paz, supra note 126, 449 (explaining that child molestors carefully select their victims and opportunities to commit the crime, and as such, “child molestors can effectively raise doubts in the minds of jurors by simply alleging that the child victim is lying or that the child’s testimony is the product of improper influence.”); Clara Gimenez, Vermont Rule of Evidence 404(B) Admissibility of Prior Bad Acts in the ‘Context’ of Child Molestation Cases, 27 Vt. L. Rev. 217, 234 (2002) (citing State v. Forbes, 161 Vt. 327 (1993) (citing Susan B. Apel, Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt, 38 Am. U. L. Rev. 491, 499 (1989) (explaining that the court “referred to studies that show that despite the relative frequency of child sexual abuse, ‘many people, including juries and judges, find it difficult to believe [child sexual abuse] happens;’” it is difficult to believe that the “ordinary” parent would sexually abuse their child.); Judy Yun, A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 Colum. L. Rev. 1745 (1983) (explaining that the child’s memory fades over time and the child is often unable to recollect details because of the lapse of time between the time of the crime and the trial).

133 Sopher, supra note 126, 643; see also Jones, 112 Wash. 2d at 494 (stating that “acts of abuse generally occur in private); In re Nicole V., 71 N.Y.2d at 117 (finding that because of the non-violent nature of child sexual abuse, the abuse is generally in secret and is therefore, difficult to detect); Tadic v. State, 281 Ga. App. 58, 59 (2006) (stating that “sexual offenses against children necessarily occur in secret.”); La Paz, supra note 126, 449 (explaining that child sexual molestation is a “crime of opportunity” in which the assailant initiates the act when the assailant is alone with the child); Gimenez, supra note 132, 234 (stating that secretiveness is an issue that surrounds child sexual abuse); Melissa R. Saad, Civil Commitment and the Sexually Violent Predator, 75 Denv. U. L. Rev. 595, 603 (1998) (stating that “the number of child sex abuse cases reported actually represents only a fraction of the actual number of offenses committed because of a significant number of clandestine incestuous incidents.”); Yun, supra note 132, 1750 (explaining that generally the only witnesses in child sex abuse case are the victim and the perpetrator because “people simply do not molest children in front of others” and generally the molester is a relative or close acquaintance that is alone with the child on many occasions); Roland C. Summit, The Child Sexual Abuse Accommodation Syndrome, 7 Child Abuse & Neglect 177, 181 (1983) (explaining that the reality of child abuse is that it occurs “only when the child is alone with the offending adult, and it must never be shared with anyone else.”).
ensure that child molesters can be prosecuted, anyone, including a spouse, who can testify about
child sexual abuse should be allowed to testify.134

Second, there is often little physical evidence in child molestation cases.135 The signs of
physical molestation are rare because medical examinations only show evidence of sexual abuse
in twenty to thirty percent of cases.136 The nature of the abuse, generally consisting of “lewd
fondling, digital penetration, or the child being forced to perform sex acts upon the assailant,”
results in little physical evidence.137 Moreover, physical evidence is rare because children often
succumb easily and do not try to resist their sexual assailants and, thus, little physical evidence
can be detected from the attack.138 Finally, because there are frequently delays in reporting
abuse, the likelihood of any physical evidence is decreased.139 Because of the lack of physical
evidence in child sexual abuse cases, the only evidence often comes from the child who is forced
to testify which, as set forth above, leads to difficulty in securing a conviction.140

134 See, e.g., People v. Allman, 342 N.Y.S.2d 896, 896 (1973) (explaining that the prevention of testimony
because of the confidential marital communications privilege would seal “the lips of the witnessing
spouse . . . to the detriment of the child; and the injustice of the act may never be uncovered.”).
135 Sopher, supra note 126, 644; see also Jones, 112 Wash. 2d at 494 (stating that “many cases leave no
physical evidence.”); Wendel, supra note 130, 322 (explaining that it is often the problem in child sexual
abuse cases that there is no independent evidence corroborating the child’s claim); Yun, supra note 132,
1749-50 (explaining that “physical corroboration is rare” because the child sexual abuse crimes are
“predominantly nonviolent in nature.”).
136 Sopher, supra note 126, 644 (1994); see also Saad, supra note 133, 603 (explaining that the symptoms
of child sex abuse victims are varied and sometimes nonexistent).
137 La Paz, supra note 126, 449.
138 Yun, supra note 132, 1750; see also NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN AND
FEDERAL BUREAU OF INVESTIGATION, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS 139 (2001)
(explaining that children are the “ideal victims” of sexual abuse because they are easily led by adults and
they are taught to obey adults’ instructions to them).
139 Sopher, supra note 126, 644.
140 Sopher, supra note 126, 644; see also Jones, 112 Wash. 2d at 494 (stating that “prosecutors must rely
on the testimony of the child victim to make their cases.”); In re Nicole V., 71 N.Y.2d at 117 (finding that
because of the secretive nature of the child sexual abuse, the child is usually the only witness); Tadic v.
State, 281 Ga. App. 58, 59 (2006) (asserting that “more often than not the child/victim is the only witness
able to provide such direct evidence.”); Yun, supra note 132, 1749 (explaining that the child’s hearsay
statement is often the only proof of the sexual abuse crime).
Because of the difficulty in successfully prosecuting child sexual abuse, this crime, unlike others, requires a broad exception under the marital communications privileges. The prosecution of molestation cases presents the same problems regardless of whether the child is the biological child of the perpetrator, the neighbor’s child, or the child with no connection to the family home. Thus, there is no logical reason to limit the exception to the confidential marital communications privilege only to children with connections to the family home. Indeed, because child molestation cases are difficult to prove, courts have created exceptions to other evidentiary privileges, but without any delineation of whether the child was a “child of either” spouse or a child “residing in the home.” The exception to the confidential marital communications privilege should follow the same route.

2. Molestation of any child negatively impacts marital harmony, which the confidential marital communications privilege purportedly protects.

The purpose of the confidential marital communications privilege is to promote marital harmony. The underlying policy is that spouses will more freely communicate with one another if they know that their deepest secrets will not later be exposed in a court. The societal benefit of marital harmony presumably resulting from free inter-spousal communication is deemed sufficiently important, on the whole, as to outweigh the societal benefit of facilitating

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141 See, e.g., Yun, supra note 132, 1745 (explaining that the children’s hearsay rule requires “that an out-of-court statement be admissible only if the requisite need and reliability can be shown. Because of the unique circumstances of child sex abuse, hearsay statements of the victim are especially necessary to establish the guilt of the defendant.”); La Paz, supra note 126, 449 (explaining that under Florida law, “similar fact evidence” is allowed in some cases of child sexual abuse when the strict requirements under the rule are met).

142 See Banks, 556 F.3d at 982 (“We held in White that the critical question in determining if the marital communications privilege should apply is whether or not the conduct is ‘inconsistent with the purposes of the marital communications privilege: promoting confidential communications between spouses in order to foster marital harmony.’”) (citing White, 974 F.2d at 1138).

143 Porter, 986 F.2d at 1018 (“The marital communications privilege . . . exists to insure that spouses . . . feel free to communicate their deepest feelings to each other without fear of eventual exposure in a court of law.”).
the fact-finding process in the judicial system. The very act of child molestation, however, strikes at the heart of marital harmony. While undoubtedly child molestation is a heinous crime, it is also a clear violation of the marital vows. Sexual abuse of a child does not further marital harmony; indeed, the very act suggests that the marriage is in shambles. When a child has been sexually abused, the bond of trust and confidence held so dearly in the marriage is most certainly broken; not only is the act of intimacy with another partner deceptive, but moreover, the act of intimacy by abusive means would likely break the trust and confidence in any marriage. It does not further the sanctity of the marriage or the family relationship to allow one spouse to talk to another about child molestation with impunity.

Arguably, the insult to the spouse may be personally greater if it is his or her child that is molested by the other spouse. However, regardless of the personal insult, the overall harm to marital harmony is the same whether it is a “child of either” spouse, a child “living in the home,” or a child previously unknown to the spouses. As one court explained: “It would be unconscionable to permit a privilege grounded on promoting communications of trust and love between marriage partners to prevent a properly outraged spouse with knowledge from testifying against the perpetrator of such a crime.”

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144 See id.
145 As the United States Supreme Court recognized in discussing the adverse spousal testimony privilege, “[w]hen one spouse is willing to testify against the other in a criminal proceeding-whatever the motivation-their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve.” Trammel, 445 U.S. at 52. This is certainly even more the case when a spouse is accused of child molestation.
146 Allery, 526 F.2d 1362 (explaining that “a serious crime against a child is an offense against that family harmony.”).
147 Martinez, 44 F. Supp. at 837 (“A privilege deeply rooted in society's interest in promoting marital harmony and stability must surely wither when the defendant-spouse is accused of abusing the children of that marriage.”).
148 See McCollum, 58 M.J. at 342 n.6 (noting that the confidential marital communications privilege was created to preserve the harmony of the marriage, but the marital harmony would be disturbed by abuse of any child, regardless of whether the child was one of either spouse).
149 Bahe, 128 F.3d at 1446.
child molestation would foster a stronger marital relationship, is irrational. The societal benefit gained by public exposure of child molestation far outweighs any injury that could be caused to the marital relationship by disclosure of such communications, particularly in light of the fact that most married couples do not even know that the privilege exists.\(^{150}\)

3. **Molestation of any child negatively impacts the society at large.**

   One court explained that “a serious crime against a child is an offense . . . to society.”\(^{151}\) This is particularly true in child molestation cases. Unlike other criminal offenders, child sex offenders often victimize multiple children and have strong, continuous urges to reoffend.\(^ {152}\) Child sexual abuse is also unique in comparison to other crimes because of the effects the crime leaves on the victims. For example, when compared to children who have not been sexually abused, sexually abused children are fifty-five percent more likely to be arrested later in life, five-hundred percent more likely to be arrested for sex crimes later in life, and three-thousand percent more likely to be arrested for adult prostitution.\(^ {153}\) Thus, while all crime has a negative impact on society, because of the recidivist nature of the offender and because of the negative impact on each victim’s future, society at large is particularly harmed if child molestation cases are not successfully prosecuted. The harm to society is the same, regardless of whether the child is the biological child of the offender or unknown to the offender. Thus, the “any child”

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\(^{151}\) Allery, 526 F.2d at 1362; see also Martinez, 44. F. Supp at 837 (“Children, especially those of tender years who cannot defend themselves or complain, are vulnerable to abuse. Society has a stronger interest in protecting such children than in preserving marital autonomy and privacy.”).

\(^{152}\) Saad, supra note 133, 604; see also childsafetips.com (asserting that the average molester will molest fifty girls before being caught and convicted).

\(^{153}\) Saad, supra note 133, 605 (citing Jonathon J. Hegre, Minnesota “Nice”? Minnesota Mean: The Minnesota Supreme Court’s Refusal to Protect Sexually Abused Children in H.B. ex rel. Clarke v. Whittmore, 15 Law and Inequ. J. 435, 440-41 (1997)).
exception to the confidential marital communications privilege should be adopted to protect society from harm.\textsuperscript{154} “A contrary rule would make children a target population within the marital enclave.”\textsuperscript{155}

4. Many state legislatures have adopted the “any child” exception to the confidential marital communications privilege.

The importance of the public interest at issue is evidenced by the fact that currently twenty-five state legislatures have adopted the broad “any child” exception.\textsuperscript{156} This current trend shows that the communications between spouses concerning child molestation are not protected because “they are antithetical to society’s concept of the marital relationship.”\textsuperscript{157} Thus, as a matter of policy, many state legislatures and courts\textsuperscript{158} see no difference in the sexual abuse of a child who is the son or daughter of the abuser as opposed to any other child who is sexually abused. Indeed, a narrower application of the exception for children under the marital

\textsuperscript{154} See Martinez, 44 F. Supp. at 837 (adopting the “any child” exception to the confidential marital communications privilege the court explained: “The Court has not searched the dark corners of the world, nor that era when mankind lived within the confines of a cave that might call for a contrary result. The Court therefore concludes that in a case where one spouse is accused of abusing minor children, society's interest in the administration of justice far outweighs its interest in protecting whatever harmony or trust may at that point still remain in the marital relationship.”).

\textsuperscript{155} 25 WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5593 at 761 (1989).

\textsuperscript{156} See supra Section III.B of this Article; infra Appendix to this Article (“any child” category).

\textsuperscript{157} Banks, 556 F.3d at 986 (Alarcón, dissenting) (explaining that “[s]ince Trammel was decided in 1980, courts, federal and state, and state legislatures, have continued to limit the marital communications privilege in obedience to the Court’s direction that it ‘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 utilization of all rational means for ascertaining the truth.’” (quoting Trammel, 445 U.S. at 912)).

\textsuperscript{158} See e.g., Banks, 556 F.3d at 988 (quoting the Supreme Judicial Court of Massachusetts in their interpretation of the Massachusetts statute (stating that “We see no logical reason for the Legislature to deny the spousal privilege when a young victim of abuse is a child of one or both spouses (or other child closely related by consanguinity) but to perpetuate the privilege when the young victim is related to neither spouse. The abuse is the same. Society's interest in convicting and punishing one who commits child abuse is the same. The threat to the preservation of the family unit arising from one spouse being compelled to testify against the other seems substantially identical in all instances.”)); Bahe, 128 F.3d at 1446 (stating that, “We see no significant difference, as a policy matter, between a crime against a child of the married couple, against a stepchild living in the home or, as here, against an eleven-year-old relative visiting the home.”).
communications privilege might be a violation of the Equal Protection Clause because the exception would only protect a “child of either” spouse or a “child in the home” as opposed to other children without any rational basis.\textsuperscript{159}

B. How Federal Courts Can Adopt the “Any Child” Exception

Although no United States Court of Appeals has adopted the “any child” exception to the confidential marital communications privilege, the legal rationale to do so is supported by both jurisprudence and public policy. To begin, the confidential marital communications privilege is not a constitutional right, but a privilege with common law roots.\textsuperscript{160} Because it is a privilege, it is not “intended to facilitate the fact-finding process or to safeguard integrity.”\textsuperscript{161} Thus, the effect of the privilege “is clearly inhibitive; rather than facilitating the illumination of truth, [it] shut[s] out the light.”\textsuperscript{162} Because the confidential marital communications privilege impedes the truth seeking process by withholding relevant testimony, it must be “strictly construed.”\textsuperscript{163}

\textsuperscript{159} See Kimberly Ann Connor, \textit{A Critique of the Marital Privileges: An Examination of the Marital Privileges in the United State Military Through the State and Federal Approaches to Marital Privileges}, 36 \textit{Val. U. L. Rev.} 119, 167-68 (“Potentially, the current version of the rule may violate the Equal Protection Clause. MRE 504 might be unconstitutional if there is not a reasonable justification for allowing a spouse to testify to confidential communications concerning biological children while simultaneously refusing to allow the testimony of similar communications involving de facto children who are abused or even murdered. Although the classification, ‘a child of either spouse’ versus all other children residing in the home is only subject to rational basis review, if the distinction is arbitrary or capricious it will nonetheless violate the Equal Protection Clause.”).

\textsuperscript{160} \textit{See supra} Section III of this Article.

\textsuperscript{161} \textsc{1 C. MCCORMICK, EVIDENCE} § 72 at 299 (5th Ed. 1999).

\textsuperscript{162} \textit{Id.}

\textsuperscript{163} \textit{Trammel}, 445 U.S. at 50-51; \textit{see also} United States v. Nixon, 418 U.S. 683, 710 (1974) (“Whatever their origins, these exceptions to the demand for every [person's] evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.”); Hawkins v. United States, 358 U.S. 74, 81 (1958) (Stewart, J. concurring) (“Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice.”); State v. Montgomery, 254 Conn. 694, 724, 759 A.2d 995 (2000) (explaining that the privilege “is to be applied cautiously and with circumspection because it impedes the truth-seeking function of the adjudicative process.”); Dan Markel et al., \textit{Criminal Justice and the Challenge of Family Ties}, 2007 \textit{U. Ill. L. Rev.} 1147, 1201-02 (2007) (noting that “every man’s evidence should be available in the administration of justice.”).
Rule 501 of the Federal Rules of Evidence provides that federal courts are to interpret the application of the confidential marital communications privilege “by principles of common law... in light of reason and experience.” In “enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege,” but rather to “provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.” Federal courts have interpreted this language to mean that the extent of evidentiary privileges must undergo a balancing test. Thus, in order to determine the extent of exceptions to the confidential marital communications privilege, the interest of protecting marital harmony must be balanced with the interest of truth-seeking in child molestation cases.

In *United States v. Allery*, the Eighth Circuit applied the balancing test to an analogous situation. The issue in *Allery* was whether there should be an exception to the adverse spousal testimony privilege, which would allow a wife to testify against a husband in the case of the sexual abuse of the husband’s step-child. That issue is narrower than the issue addressed in

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164 Fed. R. Evid. 501. Rule 501 adopted the language the United States Supreme Court used in *Wolfle*. See *Wolfle*, 291 U.S. 12; see also *Jaffee v. Redmond*, 518 U.S. 1, 8, (1996) (“The authors of the Rule [501] borrowed this phrase from our opinion in Wolfle [citation omitted] which in turn referred to the oft-repeated observation that ‘the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.’”) (citing *Funk*, 290 U.S. at 383).

165 *Trammel*, 445 U.S. at 47.

166 Id. (citing 120 Cong. Rec. 40891 (1974) (statement of Rep. Hungate)); see also *United States v. Allery*, 526 F.2d 1362, 1366 (8th Cir. 1975) (explaining that the courts have the right to review “policies behind the federal common law privileges and to alter or amend them when ‘reason and experience’ so demand.”) (quoting terms from Fed. R. Evid. 501). Although the dissent in *Allery* disagreed with the holding, it also noted that the federal courts have the right to review and alter evidentiary privileges. See id. at 1367.

167 *Banks*, 556 F.3d at 974 (explaining that the Ninth Circuit had adopted “the balancing test set forth by the Eighth Circuit in” *Allery*) (citing *Allery*, 526 F.2d at 1366-67).

168 *Banks*, 556 F.3d at 974 (noting that the confidential marital communications privilege is a “balancing [of] the public’s interest in the full and fair administration of justice and the need to protect the integrity of marriage and ensure that spouses freely communicate.”).

169 *Allery*, 526 F.2d at 1362.

170 Id. at 1363-64. The holding in *Allery* was before the United States Supreme Court held in the 1980 *Trammel* case that the “witness-spouse alone has a privilege to refuse to testify adversely.” *Trammel*, 445 U.S. at 53.
this article, which is whether there should be an “any child” exception to confidential marital communications privilege in child molestation cases. Nevertheless, Allery is still instructive for several reasons. Allery illustrates how to approach the legal analysis of applying a new exception to one of the marital privileges under Rule 501 in child molestation cases. Allery is particularly helpful since the adverse spousal testimony privilege and the confidential marital communications privilege have similar history and are derived from the same common law roots. Moreover, the underlying policy of each privilege is to protect the marital unit. Thus, Allery sets forth an appropriate analysis for determining whether exceptions to the confidential marital communications privilege should be expanded.

The Allery court found that exceptions to the adverse spousal testimonial privilege should include crimes against the child of either spouse for the following five reasons: (1) a serious crime against a child is an offense to society and family harmony, which the privilege purportedly protects; (2) parental testimony is necessary in prosecutions for child abuse; (3) limiting “truth” leads to the miscarriage of justice; (4) state common law supports an adverse spousal testimony privilege exception for crimes against children of either spouse; and (5) “at least eleven states have passed laws rendering the marital privilege inapplicable in cases of charged child abuse and neglect.”

These factors set forth by Allery can be applied to the issue here -whether the exception to the confidential marital communications privilege exception should be expanded to protect

171 See, e.g., Banks, 556 F.3d at 974 (“In determining whether the functional equivalent of a child/parent relationship should support an exception to the marital communications privilege, the rationale of Allery is instructive.”).
172 See, e.g., Trammel, 445 U.S. at 46 n. 7. See generally, supra Section II.A-B of this Article.
173 See, e.g., Porter, 986 F.2d at 1018 (noting that both the adverse spousal testimony privilege and the confidential marital communications privilege are meant to protect the marriage); see also, supra Section II.A of this Article.
174 Allery, 526 F2.d at 1366-67.
“any child” in child molestation cases. As addressed in Section IV.A of this article, the abuse of 

any child would have a negative impact on family harmony and society. Moreover, communications between spouses comprises critical testimony given the difficulty in successfully prosecuting child molestation cases. Finally, twenty-five state legislatures (more than double the “eleven states” mentioned in Allery) have recognized that the need to protect children outweighs the value of protecting the marriage relationship and, thus, have expanded the exception to the confidential marital communications privilege to include the “any child” standard. This last point alone is enough to tip the balancing scales in favor of adopting the “any child” standard since federal courts are to consider consensus among states laws when applying Rule 501.

Given that privileges are to be construed narrowly, and given that the interest in protecting the general welfare of children and the administration of justice far outweighs any possible interest protected by the confidential marital communications privilege in child

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175 See supra Sections IV.A(2), (3) of this Article.
176 See supra Section IV.A(1) of this Article.
177 See supra Sections III.B and IV.A(4) of this Article; infra the Appendix to this Article.
178 See Jaffee v. Redmond, 518 U.S. 1, 13 (1996) (stating that “it is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both ‘reason’ and ‘experience.’”) (citing Funk, 290 U.S. at 371). In Jaffee, the United States Supreme Court created the new psychotherapist-patient communications privilege. Jaffee, 518 U.S. 1. The Court reasoned:

[I]t is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 . . . by the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege. We have previously observed that the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one. Because state legislatures are fully aware of the need to protect the integrity of the factfinding functions of their courts, the existence of a consensus among the States indicates that ‘reason and experience’ support recognition of the privilege.

Jaffee, 518 at 12-13 (citing Trammel, 445 U.S. at 48-50; United States v. Gillock, 445 U.S. 360, 368 n.8 (1980)).
molestation cases, “principles of common law . . . in light of reason and experience”\(^\text{179}\) dictate that the “any child” exception should be adopted by all federal courts.\(^\text{180}\)

C. How State Legislatures Can Adopt the “Any Child” Exception

Half of the state legislatures and the District of Columbia have yet to adopt the broadest “any child” exception to the confidential marital communications privilege.\(^\text{181}\) These jurisdictions should adopt the “any child” exception for the public policy reasons set forth above, including: child molestation cases are difficult to prove, thus communications about the crime between spouses may prove critical; and child molestation of any child, regardless of the connection to the family home, is an offense to marital harmony and to society.\(^\text{182}\) It is the responsibility of the legislatures to balance competing considerations in law.\(^\text{183}\)

A proposed law would track language similar to those states which have adopted the “any child” standard.\(^\text{184}\) The law could provide that there is no confidential marital communications privilege where one spouse is charged with the molestation of any child. Because problems of prosecuting child molestation cases decreases as the age of the child increases (older children are likely more capable of testifying about sexual abuse than younger children),\(^\text{185}\) state laws should

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\(^{179}\) Fed. R. Evid. 501.

\(^{180}\) While the Ninth and Tenth Circuits are split as to what the exception to the confidential marital communications privilege should be, neither have sufficiently extended this exception to the “any child” standard. Compare Banks, 556 F.3d at 976 (adopting the “child of either” spouse exception) with Bahe, 128 F.3d at 1446 (adopting the “child living in the home” exception). See also, supra Section III.A, C of this Article.

\(^{181}\) See supra Section III.B of this Article; infra the Appendix to this Article (child of “either spouse,” and “child living in the home” categories).

\(^{182}\) See supra Sections IV.A(1)-(4) of this Article.

\(^{183}\) Eileen A. Scallen, Relational and Informational Privileges and the Case of the Mysterious Mediation Privilege, 38 Loy. L.A. L. Rev. 537, 541 (2004) (stating that “virtually all privileges…are subject to multiple exceptions, meaning that even though a holder of a privilege may want to refuse to provide certain evidence, as a matter of policy lawmakers could not allow the evidence to be withheld from the trier of fact.”).

\(^{184}\) See supra Section III.B of this Article; infra the Appendix to this Article (“any child” category).

\(^{185}\) See supra Sections IV.A(1) of this Article.
also make clear that “any child” would include individuals under the age of sixteen, or an individual with the mental ability of a sixteen-year-old.\textsuperscript{186}

It is important for state legislatures to adopt these laws because it impacts the way child molestation cases are prosecuted in both state and federal courts.\textsuperscript{187} If all states would enact similar laws adopting the “any child” standard there would be less confusion. Parties would not be forced to litigate what constitutes “\textit{de facto}” parental status,\textsuperscript{188} or what constitutes a child “living in the home.”\textsuperscript{189} With the “any child” standard it would be clear to lay-person and law-person alike that in child molestation cases, child-predators cannot confess to their spouse and then hide behind an evidentiary privilege.

D. Legal Theory Supports the Adoption of the “Any Child” Exception

Not only does public policy and jurisprudence support the adoption of the “any child” exception to the confidential marital communications privilege, legal theory supports the same conclusion. Generally, scholars have identified two legal theories concerning evidentiary

\textsuperscript{186} The age limit could be either sixteen or eighteen years of age depending on the state’s statutory rape law. \textit{See}, e.g., \textsc{ala. code} § 13A-6-62(a) (2009) (“A person commits the crime of rape in the second degree if: (1) Being 16 years old or older, he or she engages in sexual intercourse with a member of the opposite sex less than 16 . . . . (2) He or she engages in sexual intercourse with a member of the opposite sex who is incapable of consent by reason of being mentally defective.”); \textsc{ariz. rev. stat. ann.} § 13-1405(A) (2010) (“A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.”).

\textsuperscript{187} \textit{See}, e.g., \textit{jaffee}, 518 U.S. at 12-13 (explaining that it is appropriate for federal courts to consider state laws in analyzing evidentiary privileges); \textit{McCollum}, 58 M.J. at 340 (relying on the plain language of the statute and legislative intent, the court refused to expand the “child of either” spouse exception to the confidential marital communications privilege to include “\textit{de facto}” children); \textit{In re Nicole V.}, 71 N.Y.2d at 117 (1987) (stating that “In recent years preventing sexual abuse of children in family settings has become a major social and judicial concern.”).

\textsuperscript{188} The “\textit{de facto}” parental exception was the issue litigated in \textit{Banks}. \textit{See Banks}, 556 F.3d at 976; \textit{supra} Section III.A of this Article.

\textsuperscript{189} The “child living in the home” exception was the issue litigated in \textit{Bahe}. \textit{See Bahe}, 128 F.3d at 1446; \textit{supra} Section III.C of this Article.
privileges: ‘Wigmore’s Instrumental Rationale;’ and (2) the ‘Humanistic Rationale.’ Each theory will be taken in turn.

1. Wigmore’s Instrumental Rationale

Courts often cite to Wigmore’s Instrumental Rationale theory when considering the application of evidentiary privileges. Essentially, Wigmore’s Instrumental Rationale ‘rests on the factual assumption of a causal connection between the existence of a privilege and certain out-of-court behavior.’ Under this theory, evidentiary privileges, given that they impede the truth-seeking function of the courts, should be recognized only if four conditions have been met:

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.

If a privilege fails to meet any of these four conditions, then it is not valid under the Instrumental Rationale. By extension, the failure of an existing privilege to meet any one of these conditions could provide a basis to abrogate that privilege. In other words, if the use of the confidential marital communications privilege in child molestation cases compromises any one of these conditions, then the Instrumental Rationale could be used to support a necessary exception to the privilege.

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192 Imwinkelried, supra note 190, § 5.1.2 at 293.
193 Wigmore, supra note 52, § 2285, at 527; see also Imwinkelried, supra note 190, § 3.1; Story, supra note 56, 305.
194 Imwinkelried, supra note 190, § 3.2.1 at 153 (“Wigmore took the bottom-line position that the instrumental rationale ought to be ‘the chief, if not the exclusive, basis for the privilege.’”).
195 See Story, supra note 56, at 308.
While most scholars agree that the confidential marital communications privilege meets the first and third conditions of the Instrumental Rationale, critics have questioned whether the second and fourth conditions are met.\textsuperscript{196} In regard to the second condition, the privilege of confidentiality may not be essential to spousal relations since, in practice, most spouses would continue to confide in each other even if the privilege were not present.\textsuperscript{197} The fourth condition may also not be met for similar reasons. If the marital relationship is not based on a presumption of confidentiality, then a breach of it would not be sufficiently detrimental to outweigh the interests in divulging the information at trial.\textsuperscript{198} Therefore, it would be appropriate to abrogate the privilege, or provide exceptions to it, where the expectation of confidentiality is minimal and the benefit for litigations purposes is significant. This is precisely the case with the use of the confidential marital communications privilege in child molestation prosecutions. As stated earlier, there are at least four reasons why the interest in protecting children, regardless of their connection to the family unit, outweighs the benefit, if any, gained by allowing the privilege to be invoked in child molestation cases.\textsuperscript{199}

2. The Humanistic Rationale

\textsuperscript{196} \textit{Id.} at 308 (“Indeed, [Wigmore] questioned whether the instrumental model would support the case for a spousal privilege.”); \textit{see also} Wigmore, \textit{supra} note 52, § 2333 n.27.

\textsuperscript{197} \textit{See id.} at 306. This privilege may be contrasted to the attorney-client relationship, in which the privilege is critical to maintaining the affiliation. \textit{See id.} Critics contend that the underlying policy of encouraging confidences between spouses is not fostered because spouses are unaware that the privilege even exists. \textit{See id.; E. CLEARY MCCORMICK ON EVIDENCE} § 86, at 201-02 (3d ed. 1984) (explaining that “the probable benefits of the rule of privilege in encouraging marital confidences and wedded harmony is at best doubtful and marginal” because “in the lives of most people appearance in court as a party or witness is an exceedingly rare and unusual event, and the anticipation of it is not one of those factors which materially influence in daily life the degree of fullness of marital disclosures.”); Scallen, \textit{supra} note \textbf{Error! Bookmark not defined.}, at 559; \textit{Development in the Law – Privileged Communications: Familial Privileges}, 98 HARV. L. REV. 1563, 1579 (1985).

\textsuperscript{198} \textit{See id.} at 308; \textit{see also} Wigmore, \textit{supra} note 52, § 2332 at 642 (stating that under his four conditions for creation of an evidentiary privilege, an “argument against recognition of the [marital communications] privilege is based on the proposition that the fourth condition . . . is not in truth fulfilled” because “the occasional compulsory disclosure in court of even the most intimate marital communications would not in fact affect to any perceptible degree the extent to which spouses share confidences.”).

\textsuperscript{199} \textit{See supra} Section IV.A of this Article.
The Humanistic Rationale states that evidentiary privileges should be designed to protect individual rights. Unlike Wigmore’s Instrumental Rationale, which generally focuses on the benefit to society by furtherance of relationships, the Humanistic Rationale focuses on the individual’s personal rights, such as the protection of privacy. The protection of privacy justification for the use of the confidential marital communications privilege, however, fails in the context of child sexual abuse.

First, while this theory is discussed among scholars, courts have not relied on it for the confidential marital communications privilege. Moreover, to the extent that privacy is a justification for the marital communications privilege, it is only in so far as the confidential marital communications privilege is a qualified privilege, affording exceptions in cases where evidence is not otherwise obtainable. Thus, in cases of child sexual abuse where it is well-established that evidence is difficult to obtain, regardless of whether the child is related to either spouse, then an exception to the confidential marital communication privilege must exist.

V. CONCLUSION

200 Imwinkelried, supra note 190, § 5.1.2 at 293.
201 See Raymond F. Miller, Creating Evidentiary Privileges: An Argument For The Judicial Approach, 31 CONN. L. REV. 771, 784-85 (1999). In American jurisprudence, the privacy concern is rooted in the Due Process Clause of the Fourteenth Amendment where courts have recognized privacy rights in marriages, childbearing, and cohabitating. See id. at 785; see also, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (holding the United States Constitution protected an individual’s right to privacy in the use of contraceptives).
202 See Story, supra note 56, at 315 (“Because courts have exclusively relied upon the utilitarian approach to justify the evidentiary privileges, it is very unlikely that they would employ . . . the humanistic rationales.”) (citing Steven Goode, Identity, Fees, and the Attorney-Client Privilege, 59 GEO. WASH. L. REV. 307, 316 n.63 (1991) (noting that “judicial reliance” on theories other than the Instrumental Rationale is “as rare as the proverbial hen’s tooth.”)).
203 E. CLEARY MCCORMICK ON EVIDENCE § 86, at 202 (3d ed. 1984) (stating that “A desirable first step is to recognize that delicacy and decorum, while worthy and deserving of protection, will not stand in the balance where there is a need for otherwise unobtainable evidence critical to the ascertainment of significant legal rights.”).
204 See supra Section IV.A of this Article.
Child molestation is an unbearable crime. Many children are sexually abused outside their own homes by predators that have no relationship to them. A child in this situation should receive no less protection from sexual abuse than a “child of either” spouse or a child “living in the home.” Yet, in all federal circuits, half of the states, the District of Columbia and the military, this is exactly the scenario when defendants confess their crimes to their spouses and then invoke the confidential marital communications privilege.\textsuperscript{205} Public policy, jurisprudence, and legal theory support the adoption of a broad “any child” exception to the use of the confidential marital communications privilege in child molestation cases.\textsuperscript{206}

\textsuperscript{205} See supra Section III of this Article; infra Appendix to this Article.

\textsuperscript{206} Although beyond the scope of this article, given the common history and common underlying policy of both marital privileges, see supra Section II, similar arguments could be made that a testifying spouse should not be allowed to invoke the adverse spousal testimony privilege in the prosecution of the sexual abuse of any child. But see United States v. Jarvison, 409 F.3d 1221, 1231 (10th Cir. 2005) (holding that that testifying spouse can invoke the adverse spousal testimony privilege in abuse of the defendant’s granddaughter).
## APPENDIX

### SUMMARY OF EXCEPTIONS

**TO THE CONFIDENTIAL MARRITAL COMMUNICATIONS PRIVILEGE**

**IN CHILD MOLESTATION CASES**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Exception for: “Child of Either” Spouse (Includes <em>De Facto</em> Parental Status)(^\text{207})</th>
<th>Exception for: “Child Residing in the Home” (<em>De Facto</em> Parental StatusUnnecessary)(^\text{208})</th>
<th>Exception for: “Any Child”(^\text{209})</th>
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<tr>
<td><strong>FEDERAL</strong></td>
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<tr>
<td>9(^{\text{th}}) Circuit</td>
<td><em>United States v. Banks</em>, 556 F.3d 967, 975 (9th Cir. 2009) (holding that the marital communications privilege does not apply to statements relating to a crime where a spouse’s children are the victims and “[c]onsidering the comparable familial ties, we conclude that violence against the functional equivalent of a child should be afforded the same protections as violence against the birth or step-child of a married couple.”).</td>
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\(^{207}\) Category 1, the “child of either” spouse exception, comprises the narrowest exception to the confidential marital communications privilege. This exception is applicable in cases that concern the abuse and molestation of a biological child or legally recognized child of either spouse. The “child of either” spouse exception also includes those situations in which the child is in the care or custody of either spouse or in which the spouses are acting as “*de facto*” parents, including foster parents.

\(^{208}\) Category 2, the “child residing in the home” exception, is the second narrowest exception to the confidential marital communication privilege. This exception extends to a child who is living in the home. The laws grouped in this category differ from those grouped in Category 1 in that it is not required that the child be a biological child of either spouse, or that the child be in the care or custody of either spouse, or that the spouses are acting as “*de facto*” parents.

\(^{209}\) Category 3, the “any child” exception, is the broadest exception to the confidential marital communication privilege. This exception applies to communications involving the molestation of any child, regardless of the connection to the family home.
<table>
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<tr>
<th>Jurisdiction</th>
<th>Exception for: “Child of Either” Spouse (Includes <em>De Facto</em> Parental Status)&lt;sup&gt;207&lt;/sup&gt;</th>
<th>Exception for: “Child Residing in the Home” (<em>De Facto</em> Parental Status Unnecessary)&lt;sup&gt;208&lt;/sup&gt;</th>
<th>Exception for: “Any Child”&lt;sup&gt;209&lt;/sup&gt;</th>
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<tr>
<td>1&lt;sup&gt;st&lt;/sup&gt; through 8&lt;sup&gt;th&lt;/sup&gt;, 11&lt;sup&gt;th&lt;/sup&gt; and D.C. Circuits</td>
<td><em>(no appellate cases on point)</em>&lt;sup&gt;210&lt;/sup&gt;</td>
<td>1997) (“Exercising the ‘reason and experience’ granted to us by Fed. R. Evid. 501 we recognize an exception to the marital communications privilege for spousal testimony relating to the abuse of a minor child within the household.”).</td>
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<td>Military Courts</td>
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<td><strong>MIL. R. EVID. 504(d)</strong>&lt;sup&gt;211&lt;/sup&gt;</td>
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<td>STATES</td>
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<td><strong>ALA. R. EVID. 504(d)(3)</strong></td>
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<td><strong>ALASKA R. EVID. 505(b)(2)(A)</strong>&lt;sup&gt;212&lt;/sup&gt;</td>
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<td>Arizona</td>
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<td><strong>ARIZ. REV. STAT. ANN. § 12-2232(2) (2010)</strong>&lt;sup&gt;213&lt;/sup&gt;</td>
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<td><strong>ARK. R. EVID. 504(d)</strong>&lt;sup&gt;214&lt;/sup&gt;</td>
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<sup>210</sup> While there is no appellate case on point for the First through Eighth Circuits, Eleventh Circuit, or D.C. Circuit, there are a few federal district court cases in these Circuits addressing the exception to the confidential marital communications privilege in child abuse cases. See United States v. Martinez, 44 F. Supp. 2d 835, 837 (W.D. Tex. 1999) (holding that “the marital communications privilege should not apply to statements relating to a crime where the victim is a minor child.”); United States v. Mavroules, 813 F. Supp. 115, 120 (D. Mass. 1993) (recognizing that “[p]rotecting threats against . . . a spouse's children is inconsistent with the marital communications privilege”) *(citing United States v. White, 974 F.2d 1135 (9th Cir. 1992)).*

<sup>211</sup> Rule 504 of the Military Rules of Evidence was enacted after United States v. McCollum, 58 M.J. 323 (C.A.A.F. 2003) (holding that there is an exception to the marital communications privilege when a “child of either” is a victim). Thus, Rule 504 broadened the exception to include children residing in the home that were not necessarily a “child of either.”

<sup>212</sup> See, e.g., Daniels v. State, 681 P.2d 341, 345 (Alaska 1984) (finding that the adverse spousal testimony privilege rule, the language of which is analogous to Alaska’s confidential marital communications privilege rule, extended to a “foster child”).

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<td>GA. CODE ANN. §§ 24-9-21(1), 24-9-23(b) (West 2009)</td>
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214 Munson v. State, 959 S.W.2d 391, 393 (Ark. 1998) (holding that exception to confidential marital privilege applied to child “residing” in the household).

215 People v. Siravo, 17 Cal. App. 4th 555, 560 (1993) (stating that no marital privilege applies when there is a crime against a child or “cohabitant” of either spouse).

216 People v. Corbett, 656 P.2d 687, 689 (Colo. 1983) (explaining that state statute indicates that child abuse cases are an exception to the marital privilege doctrine).


219 State v. Howard, 728 A.2d 1178, 1179 (Del. 1998) (explaining that marital privilege does not apply to a wrong against a child of either spouse or against a person residing in either household).

220 See also D.C. CODE § 22-3024 (2009) (providing “Laws attaching a privilege against disclosure of communications between spouses or domestic partners are inapplicable in prosecutions under subchapter II of this chapter where the defendant is or was married to the victim, or is or was a domestic partner of the victim, or where the victim is a child.”). “Child” is defined in D.C. Code § 14-306(b)(1)(B) as “(i) In the custody of or resides temporarily or permanently in the household of one of the spouses or domestic partners; or (ii) Related by blood, marriage, domestic partnership, or adoption to one of the spouses or domestic partners.”

221 Hill v. State, 846 So.2d 1208, 1212 (Fla. 2003) (holding no marital privilege for crime against child of either spouse).

222 Nichols v. State, 653 S.E.2d 300, 305 (Ga. 2007) (holding that marital privilege does not apply to crimes against a minor child).
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<td>LA. CODE EVID. ANN. ART. 504(c)(1), (4) (2009); LA. REV.</td>
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223 *See, e.g.*, State v. Okubo, 53 P.3d 1204, 1207 (Ha. 2002) (holding that under Rule 505, no spousal privilege exists for a crime against child of either spouse, nor does the privilege exist for a person residing in the household of either).

224 *See, e.g.*, State v. Moore, 965 P.2d 174, 182 (Idaho 1998) (holding that the husband-wife privilege does not apply to issues relating to condition or welfare of a child, including abuse).

225 People v. Eveans, 660 N.E.2d 240, 247 (Ill. 1996) (holding marital privilege exception applies where either spouse has the care, custody, or control of any child).

226 Deasy-Leas v. Leas, 693 N.E.2d 90, 96 (Ind. 1998) (holding that child abuse and neglect are exceptions to privileged communications) (abrogated on other grounds).

227 State v. Anderson, 636 N.W.2d 26, 31 (Iowa 2001) (holding an exception for marital communication privilege for “evidence of injuries to children . . . that resulted from or related to a report of suspected child abuse.”).

228 State v. Myers, 640 P.2d 1245, 1247 (Kan. 1982) (recognizing that no marital privilege in relation to a crime against a child of either spouse).

229 Lynch v. Commonwealth, 74 S.W.3d 711, 713 (Ky. 2002) (holding privilege does not apply when one spouse is charged with wrongful conduct against an individual residing in the household of either spouse).
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<td>MO. ANN. STAT. §§ 210.140, 546.260(2) (West 2010)²³⁶</td>
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²³⁰ L. A. REV. STAT. ANN. § 14:403(B) provides: “In any proceeding concerning the abuse or neglect or sexual abuse of a child or the cause of such condition, evidence may not be excluded on any ground of privilege, except in the case of communications between an attorney and his client or between a priest, rabbi, duly ordained minister or Christian Science practitioner and his communicant.”


²³³ People v. Simpson, 347 N.W.2d 215, 217 (Mich. Ct. App.1984) (vacated on other grounds) (holding “the exception for crimes committed against the children of one or both spouses is not restricted to minor children, but rather extends to all children regardless of age.”).

²³⁴ State v. Willette, 421 N.W.2d 342 (Minn. Ct. App. 1988) (holding no privilege applies in cases of "sexual abuse of a child by a person responsible for, or in a position of authority over, that child.").

²³⁵ Stevens v. State, 867 So. 2d 219, 224 (Miss. 2003) (marital privilege statute “contains an exception to the privilege where one spouse is charged with a crime against a minor child.”).

²³⁶ Mo. ANN. STAT. §§ 210.140(3)(c) provides in relevant part: “Any legally recognized privileged communication, except that between attorney and client or involving communications made to a minister or clergyperson, shall not apply to situations involving known or suspected child abuse or neglect . . .”
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237 Matter of J. H., 640 P.2d 445, 447 (Mont. 1982) (holding privilege does not apply because “once a family member has been sexually abused, the sanctity of the home and the reason for the rule have been destroyed.”).
239 Meador v. State, 711 P.2d 852, 854 (Nev. 1985) (overruled on other grounds) (reasoning the privilege is inapplicable “where the spouse invoking the privilege has been charged with a crime against a child in the custody or control of either spouse.”).
241 State v. Howell, 596 P.2d 277, 278 (N.M. Ct. App. 1979) (holding exception to the privilege only applies when the victim is a child of either spouse and finding that a daycare worker cannot establish *loco parentis* status qualifying for the exception).
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<td>TENN. CODE ANN. § 24-1-201(b)(2) (West 2009)</td>
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243 *But cf.* Akron v. Hockman, 144 Ohio App.3d 262 (2001) (explaining that the spousal testimonial privilege portion of Ohio Rev. Code Ann. § 2945.42 has been preempted by Rule 601 of the Ohio Rules of Evidence). Rule 601(B) provides in relevant part: “Every person is competent to be a witness except … (B) A spouse testifying against the other spouse charged with a crime except when [ ] the following applies: (1) a crime against the testifying spouse or a child of either spouse is charged . . .”

244 *See also* OHIO R. EVID. 501 (providing the “privilege of a witness, person, state or political subdivision thereof shall be governed by statute enacted by the General Assembly or by principles of common law as interpreted by the courts of this state in the light of reason and experience.”); State v. Wilson, 2006 WL 1062103 (Ohio App., 3 Dist. 2006) (holding that the marital privilege did not apply when charge was rape of couple’s daughter).

245 State v. Suttles, 597 P.2d 786 (Or. 1979) (holding that legislative history abrogates both testimonial and communications privileges, as codified by statute, in cases involving abuse of a child, including sexual molestation).

246 42 PA. CONS. STAT. ANN. § 5913 (West 2009) (applying an exception to the marital communications privilege for sex crimes and rape when any child is the victim of the crime, but applying only to children in the “care or custody” of either spouse when the child is a victim of all other crimes).

247 R.I. GEN. LAWS § 12-17-10 (West 2009) (abolishing the marital communications privilege and therefore, any time a child is subject of criminal abuse, there is no privilege for marital communications). *See* State v. Angell, 405 A.2d 10, 16 (1979) (holding that “[section] 12-17-10 has altered the common-law privilege of confidential communications between a husband and wife.”).

248 Adams v. State, 563 S.W.2d 804, 809 (Tenn. Crim. App. 1978) (holding that “the marital privilege does not apply so as to prevent the admission of testimony by a defendant's spouse concerning acts of
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violence or personal injury inflicted by the defendant upon the children of either spouse or upon minor children in the custody of or under the dominion and control of either spouse.”).  
249 Rodriguez v. State, 2008 WL 442577 (Tex. App., 14th Dist. 2008) (holding that the privilege was abrogated when crime was against a minor).

250 State v. Widdison, 4 P.3d 100 (Utah App. 2000) (holding that marital privilege did not apply when crime was against child living in household of husband).

251 State v. Wood, 758 P.2d 530 (Wash. App. 1988) (holding no marital privilege where defendant was “guardian” of child for purposes of the statute).

252 State v. Delaney, 417 S.E.2d 903 (W. Va. 1992) (holding that the marital privilege did not apply when charge was sexual assault of couple’s child).

253 State v. Michels, 414 N.W.2d 311, 316 (Wis. Ct. App. 1987) (explaining that exception to marital privilege extends to foster children because the exception “is to ensure that those individuals, particularly minor children, who are present in the home and are actively a part of the family structure are protected, via criminal prosecution, for crimes committed against them.”).