

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

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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

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

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1. Set forth in the Appendix to this Article *infra* Part VI, Table 2 summarizes 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* Part III.

2. *See, e.g.*, United States v. McCollum, 58 M.J. 323, 339 (C.A.A.F. 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* Appendix *infra* Part VI.

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 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.

The purpose of this Article is to show that jurisdictions should expand the child-of-either-spouse exception so that defendants cannot 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. Part II of this Article explores the history and the general requirements of the marital privileges. Part III 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, included in Part VI, groups the exceptions into three categories. Part IV of this Article sets forth the reasons why federal courts and state legislatures should adopt the any-child exception and the legal analysis, including proposed legislation, of how they can do so.

3. See, e.g., *United States v. Banks*, 556 F.3d 967, 974–77 (9th Cir. 2009) (explaining that the exception to the confidential-marital-communications privilege did not extend to the defendant's confession to his wife of making a pornographic video of his grandson); see also Appendix *infra* Part VI.

4. See, e.g., *Pereira v. United States*, 347 U.S. 1, 6 (1954) (stating that divorce does not terminate privilege for confidential marital communications made during a valid marriage).

5. See Appendix *infra* Part VI.

6. *United States v. White*, 974 F.2d 1135, 1138 (9th Cir. 1992) (explaining that the confidential-marital-communications privilege fosters marital harmony).

7. See Appendix *infra* Part VI.

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.⁸ These two privileges interrelate and provide two levels of protection for communications between spouses. The adverse-spousal-testimony privilege governs the competency of a witness, which determines whether a spouse is allowed to testify against his or her spouse.⁹ 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.¹⁰

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.¹¹ Unlike the adverse-spousal-testimony privilege, the witness does not hold the marital-communications privilege and, therefore, the nontestifying spouse can invoke the privilege even if the witness-spouse wants to testify about the communications.¹² 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.¹³ Some scholars have likened the marital-communications privilege to a broader version of the attorney-client privilege (or doctor-patient privilege).¹⁴ 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.¹⁵ Table 1 summarizes the general requirements of each privilege.

8. David Farnham, *The Marital Privilege*, LITIGATION, Winter 1992, at 34, 34.

9. *See id.*

10. *Id.*

11. *Id.* The marriage must be considered valid. *United States v. Marashi*, 913 F.2d 724, 729 (9th Cir. 1990).

12. Farnham, *supra* note 8, at 34.

13. *Marashi*, 913 F.2d at 729; *United States v. Lustig*, 555 F.2d 737, 747 (9th Cir. 1977).

14. Farnham, *supra* note 8, at 36.

15. *Id.*

Table 1: Adverse-Spousal-Testimony Privilege Versus Confidential-Marital-Communications Privilege

	Adverse-Spousal-Testimony Privilege	Confidential-Marital-Communications Privilege
General Purpose ¹⁶	“The testimonial privilege looks forward with reference to the particular marriage at hand: the privilege is meant to protect against the impact of the testimony on the marriage.” ¹⁷	“The marital communications privilege[,] in a sense, is broader and more abstract [than the adverse-spousal-testimony privilege]: it 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.” ¹⁸
Scope	The scope includes testimony from a spouse against a spouse on all matters in a criminal proceeding, ¹⁹ including those that occurred before and during the marriage. ²⁰	The scope includes testimony in a criminal or civil proceeding concerning confidential ²¹ communications ²² made between spouses. ²³

16. While the underlying policy of both marital privileges is to preserve the marriage, there are some differences between the purposes of the adverse-spousal-testimony privilege and the confidential-marital-communications privilege. See, e.g., *United States v. Porter*, 986 F.2d 1014, 1018–19 (6th Cir. 1993) (explaining that the “rationale” for the confidential-marital-communications privilege “differs somewhat from that of the adverse testimony privilege”).

17. *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)); see also *Porter*, 986 F.2d at 1018 (quoting *United States v. Byrd*, 750 F.2d 585, 590 (7th Cir. 1984)).

18. *Porter*, 986 F.2d at 1018 (quoting *Byrd*, 750 F.2d at 590); see *Westmoreland*, 312 F.3d at 307 n.3 (quoting *Lofton*, 957 F.2d at 477); see also *United States v. Banks*, 556 F.3d 967, 974 (9th Cir. 2009) (“[The confidential marital] privilege exists ‘to protect the integrity of marriages and ensure that spouses freely communicate with one another.’” (quoting *United States v. Griffin*, 440 F.3d 1138, 1143 (9th Cir. 2006))).

19. The role of marital privileges in civil litigation remains unclear and is beyond the scope of this Article. See, e.g., *In re Martenson*, 779 F.2d 461, 463 n.6 (8th Cir. 1985) (discussing the issue of whether the adverse-spousal-testimony privilege is allowed in civil litigation).

20. *United States v. Apodaca*, 522 F.2d 568, 570–71 (10th Cir. 1975) (holding that adverse-spousal-testimony privilege would apply to matters occurring prior to marriage but denying the use of the privilege because the marriage in the case was fraudulent). But see *United States v. Clark*, 712 F.2d 299, 302 (7th Cir. 1983) (holding that adverse-spousal-testimony privilege does not apply to acts before marriage).

21. Courts have held that any communications made in the absence of a third party are presumed confidential. *Pereira v. United States*, 347 U.S. 1, 6 (1954); see also *Blau v. United States*, 340 U.S. 332, 333 (1951).

22. 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

	Adverse-Spousal-Testimony Privilege	Confidential-Marital-Communications Privilege
Holder of the Privilege	The testifying spouse alone has the privilege to refuse to testify and may not be forced to testify or prevented from testifying. ²⁴	Either spouse may assert the privilege; ²⁵ thus, even if one spouse is willing to testify, the other may object and thereby bar the testimony. ²⁶
Timing	To claim the privilege, the defendant and the testifying spouse must have a valid marriage <i>at the time the witness is called to testify</i> . ²⁷	The privilege attaches <i>at the time the confidential communication was made between the spouses</i> . ²⁸
Survives Termination of Marriage?	No, the privilege terminates with the termination of the marriage. ²⁹	Yes, confidential communications made during a valid marriage survive termination of the marriage. ³⁰

Although the adverse-spousal-testimony privilege and confidential-marriage-communications privilege allow for different levels of protection, they have the same historic roots.³¹ 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.

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 the other.” *United States v. Espino*, 317 F.3d 788, 795 (8th Cir. 2003).

23. GLEN WESSINBERGER & JAMES J. DUANE, *FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY* 249–50 (2007).

24. *Trammel v. United States*, 445 U.S. 40, 53 (1980).

25. *See Wolfle v. United States*, 291 U.S. 7, 14 (1934); *United States v. Montgomery*, 384 F.3d 1050, 1058–59 (9th Cir. 2004).

26. *See United States v. Wood*, 924 F.2d 399, 401–02 (1st Cir. 1991).

27. *See United States v. Apodaca*, 522 F.2d 568, 571 (10th Cir. 1975).

28. *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).

29. *See, e.g., United States v. Marashi*, 913 F.2d 724, 729 (9th Cir. 1990) (holding that the adverse-spousal-testimony privilege may not be asserted once the marriage ends).

30. *Pereira v. United States*, 347 U.S. 1, 6 (1954); *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).

31. *Trammel v. United States*, 445 U.S. 40, 44–45 (1980).

B. Legal History of the Marital Privileges

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

The United States Supreme Court³² and many commentaries³³ 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.³⁴ The spousal-disqualification rule has medieval roots.³⁵ Lord Coke observed in 1628 that “it hath beene resolved by the Justices that a wife cannot be produced either against or for her husband.”³⁶

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.³⁷ 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.³⁸ From these two doctrines, the

32. *Id.*; *Hawkins v. United States*, 358 U.S. 74, 75 (1958).

33. David Medine, *The Adverse Testimony Privilege: Time to Dispose of a “Sentimental Relic”*, 67 OR. L. REV. 519, 522–23 (1988); Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045, 2054 (1995); *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1564 (1985) [hereinafter *Developments in the Law*].

34. 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE §§ 66, 78. (6th ed. 2006). 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) (explaining that while 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*: “The 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 33, at 523; *see also* Richard O. Lempert, *A Right to Every Woman’s Evidence*, 66 IOWA L. REV. 725, 726–27 (1981); *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 NW. U. L. REV. 208, 209–10 (1961). *See generally* 25 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5572 (1989) (describing the policy behind spousal privileges).

35. *Trammel*, 445 U.S. at 43.

36. *Id.* at 43–44 (quoting 1 E. COKE, A COMMENTARIE UPON LITTLETON 6b (1628)); *see also* Michael W. Mullane, *Trammel v. United States: Bad History, Bad Policy, and Bad Law*, 47 ME. L. REV. 105, 128 (1995) (noting that Lord Coke’s Commenterie upon Littleton was the first known reference to the spousal disqualification rule).

37. *Trammel*, 445 U.S. at 44; Mullane, *supra* note 36, at 122.

38. *Trammel*, 445 U.S. at 44. *See generally* 1 BROUN ET AL., *supra* note 34, § 78 (discussing the history and background of the privilege for marital communication).

rule of spousal disqualification emerged: “[W]hat was inadmissible from the lips of the defendant-husband was also inadmissible from his wife.”³⁹ 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.”⁴⁰

The United States Supreme Court first recognized the rule of spousal disqualification in the 1839 case of *Stein v. Bowman*.⁴¹ 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.”⁴² 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.⁴³ The reasoning was that if a defendant was competent to testify on his own behalf, then it was hard to argue that a 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*⁴⁴ reasoned that “nor can 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.”⁴⁵ 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

39. *Trammel*, 445 U.S. at 44; *Recent Decisions*, *supra* note 34, at 329 (noting that the rule of spousal disqualification dealt mainly with the witness-spouse testifying *favorably* for the defendant-spouse: “Against 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”).

40. Lempert, *supra* note 34, at 728 (quoting COKE, *supra* note 36). Dean Wigmore presents a different argument, explaining that the privilege originated not from the spousal disqualification rule, but from the doctrine of petit treason: “At 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 33, at 1564–65.

41. 38 U.S. 209, 222–23 (1839).

42. *Id.* at 215.

43. Act of Mar. 16, 1878, ch. 37, 20 Stat. 30 (current version at 18 U.S.C. § 3481 (2006)).

44. *Funk v. United States*, 290 U.S. 371, 387 (1933) (overruling *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); *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”).

45. *Id.* at 381.

disqualification.”⁴⁶ The Court reasoned that adverse testimony by a spouse might destroy a marriage, so in the 1958 case, *Hawkins v. United States*,⁴⁷ the Court finally held that both spouses held the privilege to bar adverse testimony.⁴⁸

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 nontestifying spouse that was able to exercise the privilege to prevent testimony.⁴⁹ In 1980, the Court tackled the privilege once again in *Trammel v. United States*.⁵⁰ After reciting the torrid history of the privilege,⁵¹ 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.”⁵² Thus, since *Trammel*, the spousal-testimony privilege belongs to the spouse who is testifying, and that spouse can decide whether to exercise that privilege.⁵³

2. Legal History of the Confidential-Marital-Communications Privilege

While the marital-communications privilege arose contemporaneously with the spousal-disqualification rule⁵⁴ that spouses

46. *Trammel v. United States*, 445 U.S. 40, 44 (1980) (citation omitted).

47. 358 U.S. 74, 78–79 (1958).

48. *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”).

49. The *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.” *Id.* at 79. The Court further noted that 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.” *Id.* at 77.

50. *Trammel*, 445 U.S. at 41–42.

51. *Id.* at 43–48. The Court proceeded carefully because “the long history of the privilege suggests that it ought not to be casually set aside.” *Id.* at 48.

52. *Id.* at 53.

53. Before the *Trammel* case, one court 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. *United States v. Allery*, 526 F.2d 1362, 1366–67 (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).

54. 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) *The common law unity of husband and wife*. Upon marriage, the wife lost

were incompetent to testify against each other,⁵⁵ it began to distinguish itself as a separate privilege.⁵⁶ In 1934, the Supreme Court expressly recognized the confidential-marital-communications privilege in *Wolfe v. United States*.⁵⁷ In *Wolfe*, the defendant-husband wrote a letter to his wife by dictating its contents to a stenographer who then transcribed the letter.⁵⁸ The Court held the communication was not privileged since it was made in the presence of a third party.⁵⁹ The Court reasoned:

Communications 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.⁶⁰

her separate identity, and the husband and wife became a legal unity, represented by the husband. Only he could sue or be sued. If the wife had an action, it had to be brought in the husband's name. Since parties were incompetent as witnesses, the husband could not testify. Therefore neither could his alter ego, his wife.

(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.

Damian P. Richard, *Expanding the “Child of Either” Exception to the Husband-Wife Privilege Under the New M.R.E. 504(D)*, 60 A.F. L. REV. 155, 157 n.9 (2007) (quoting RONALD CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 168 (4th ed. 1997)); see also 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2227 (John T. McNaughton ed. rev. ed. 1961) (discussing the history of the privilege to testify against one's wife or husband).

55. Richard, *supra* note 54, at 158–59.

56. *Id.*

57. *Wolfe v. United States*, 291 U.S. 7, 7 (1934).

58. *Id.* at 12.

59. *Id.* at 16–17. 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: “Where 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 (2006).

60. *Wolfe*, 291 U.S. at 14 (explaining that the reasoning behind the privilege “is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to

Wolfe sets the legal framework of the marital-communications privilege. “[M]arital communications are presumptively confidential.”⁶¹ Thus, the party seeking to introduce the privileged communication bears the burden to overcome this presumption.⁶² This privilege, however, can be waived if a third party is present during the communication.⁶³ These requirements for the marital-communications privilege were reaffirmed in 1951.⁶⁴

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,⁶⁵ 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.”⁶⁶ 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.⁶⁷

Though historically criticism was levied against the adverse-spousal-testimony privilege,⁶⁸ the 1975 proposed Federal Rules of Evidence

outweigh the disadvantages to the administration of justice which the privilege entails”).

61. *Blau v. United States*, 340 U.S. 332, 333 (1951).

62. *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).

63. *Pereira v. United States*, 347 U.S. 1, 6 (1954); *Wolfe*, 291 U.S. at 14 (explaining there is no privilege where the statements are made to, or in the presence of, third parties).

64. *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.

65. 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.” 8 WIGMORE, *supra* note 54, § 2228, at 221.

66. *Regan*, *supra* note 33, at 2057; see also 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 59, at 280.

67. “In [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 v. United States*, 445 U.S. 40, 45 (1980) (citing 8 WIGMORE, *supra* note 54, § 2227). The Court explained, however: “This Court recognized just such a confidential marital communications privilege in [*Wolfe* and *Blau*]. 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 (citation omitted).

68. See W.I.T., Jr., 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, 373–75 (1952).

eliminated the confidential-marital-communications privilege but kept the adverse-spousal-testimony privilege.⁶⁹ Congress debated the revisions and delayed enactment of the rules for two years in part because of the marital privileges.⁷⁰ 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.⁷¹ 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. . . .⁷²

Despite Professor Black’s concerns, the Advisory Committee reasoned that because most married couples were unaware of the marital-communications privilege, it probably had little influence on how spouses conducted themselves inside the marriage.⁷³

69. Story, *supra* note 59, 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. . . .

25 WRIGHT & GRAHAM, *supra* note 34, 425–26. The Advisory Notes to the Proposed Rule 505 expressly stated: “The rule recognizes no privilege for confidential communications.” *Id.* at 426.

70. Mullane, *supra* note 36. See generally 25 WRIGHT & GRAHAM, *supra* note 34, § 5571 (exploring the statutory history of Proposed Rule 505).

71. Charles L. Black, Jr., *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 48 (1975).

72. *Id.* at 47.

73. Story, *supra* note 59, 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.

Congress ultimately decided to abandon any evidence rule providing for a specific privilege.⁷⁴ 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.”⁷⁵ 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

All fifty states have codified the adverse-spousal-testimony privilege and the confidential-marital-communications privilege.⁷⁶ The military

CRIM. L. 339, 362 (2006).

74. The Advisory Committee proposed that Article V of the Federal Rules contain thirteen rules relating to privilege. FED. R. EVID. 501 advisory committee’s note. 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. *Id.*

75. Rule 501 of the Federal Rules of Evidence provides in full:

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.

FED. R. EVID. 501.

76. See ALA. R. EVID. 504; ALASKA R. EVID. 505; ARIZ. REV. STAT. ANN. §§ 12-2231 to -2232 (Supp. 2009); ARK. R. EVID. 504; CAL. EVID. CODE §§ 970-973 (West 2009); COLO. REV. STAT. ANN. § 13-90-107 (West Supp. 2009); CONN. GEN. STAT. ANN. § 54-84a (West 2009); DEL. R. EVID. 504; FLA. STAT. ANN. § 90.504 (West 1999); GA. CODE ANN. §§ 24-9-21, -23 (West 2003); HAW. REV. STAT. § 626-1 (West 2008); IDAHO CODE ANN. § 9-203 (West 2006); 735 ILL. COMP. STAT. ANN. 5/8-801 (West 2003); IND. CODE ANN. § 34-46-3-1(4) (West 1999); IOWA CODE ANN. § 622.9 (West 1999 & Supp. 2010); KAN. STAT. ANN. §§ 60-423, -428 (2005); KY. R. EVID. 504; LA. CODE EVID. ANN. art. 504 (2006); art. 505 (Supp. 2010); ME. R. EVID. 504; MD. CODE ANN., CTS. & JUD. PROC. §§ 9-105, -106 (West 2002); MASS. GEN. LAWS ANN. ch. 233, § 20 (West 2000); MICH. COMP. LAWS ANN. § 600.2162 (West Supp. 2010); MINN. STAT. ANN. § 595.02 (West 2010); MISS. R. EVID. 504; MO. ANN. STAT. § 546.260 (West 2002); MONT. CODE ANN. § 26-1-802 (2009); NEB. REV. STAT. § 27-505 (West 2009); NEV. REV. STAT. ANN. §§ 49.295 to .305 (West 2004); N.H. R. EVID. 504; N.J. STAT. ANN. § 2A:84A-16 (West Supp. 2010); § 2A:84A-22 (West 1994); N.M. R. EVID. 11-505; N.Y. C.P.L.R. 4502(b) (McKinney 2007); N.C. GEN. STAT. ANN. § 8-57(c) (West 2000); N.D. R. EVID. 504; OHIO REV. CODE ANN. § 2317.02(D) (West Supp. 2009);

and the District of Columbia have also codified both privileges.⁷⁷ Three common exceptions to the privileges exist.⁷⁸ First, the privilege generally does not apply in cases where the communication concerns present or future criminal activity.⁷⁹ Second, the privilege generally does not apply in cases involving crimes against the spouse.⁸⁰ Third, the privilege does not apply for a crime against the child of either spouse.⁸¹

The remaining portion of this Article examines how this third exception applies to the marital-communications privilege in child-molestation cases. The Article focuses 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 nontestifying 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 about the communications or whether the marriage has been terminated—the nontestifying spouse can prevent the testimony.⁸² As argued in the remainder of this Article, however, 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

§ 2921.22(G)(1) (West Supp. 2010); § 2945.42 (West 2006); OKLA. STAT. ANN. tit. 12, § 2504 (West 2010); OR. REV. STAT. ANN. § 40.255 (West 2003); 42 PA. CONS. STAT. ANN. §§ 5913–5914, 5923–5926 (West 2000); R.I. GEN. LAWS ANN. § 9-17-13 (West 2006); S.C. CODE ANN. § 19-11-30 (1985); S.D. CODIFIED LAWS §§ 19-13-12 to -15 (2004); TENN. CODE ANN. § 24-1-201 (West 2002); TEX. R. EVID. 504; UTAH R. EVID. 502; VT. STAT. ANN. tit. 12, § 1605 (West 2007); VA. CODE ANN. § 8.01-398 (West Supp. 2010); WASH. REV. CODE ANN. § 5.60.060(1) (West 2009); W. VA. CODE ANN. §§ 57-3-3 to 57-3-4 (West 2002); WIS. STAT. ANN. § 905.05 (West 2000); WYO. STAT. ANN. §§ 1-12-101(a)(iii), 104 (West 2007).

77. MILITARY R. EVID. 504; D.C. CODE § 14-306 (Supp. 2010).

78. See generally Richard, *supra* note 54, at 160–61 (discussing spousal incapacity and confidential communication privileges and various exceptions related to them).

79. See, e.g., *United States v. Marashi*, 913 F.2d 724, 730–31 (9th Cir. 1990); *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) (quoting *United States v. Sims*, 755 F.2d 1239, 1243 (6th Cir. 1985)).

80. See, e.g., *Wyatt v. United States*, 362 U.S. 525, 526–27 (1960) (finding an exception to the adverse-spousal-testimony privilege where the offense charged was against the spouse).

81. See, e.g., *United States v. Allery*, 526 F.2d 1362, 1367 (8th Cir. 1975) (finding an exception to the adverse-spousal-testimony privilege where the offense charged was against the child of either spouse).

82. See *United States v. Woods*, 924 F.2d 399, 401–02 (1st Cir. 1991).

in cases where the crime is against the “child of either spouse.” 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 *United States v. McCollum*, 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.⁸³ The defendant claimed that the statements he made to his wife about the rape were confidential marital communications and, thus, entitled to privilege.⁸⁴ The military evidence rule, at that time,⁸⁵ provided an exception to the privilege in “proceedings in which one spouse is charged with a crime against the . . . child of either.”⁸⁶ The government argued that the language “child of either” should include those children considered to be “de facto” children.⁸⁷ 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.”⁸⁸ Thus, the court held that a de facto child did not constitute a

83. *United States v. McCollum*, 58 M.J. 323, 334 (C.A.A.F. 2003).

84. *Id.* at 334–35.

85. After the *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 child, adopted child, or ward of one of the spouses but also include[d] 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.” See MILITARY R. EVID. 504(c)(2)(A); see also Richard, *supra* note 54, at 171 n.82 (stating the full text of the proposed subsection (d) to Military Rule of Evidence 504).

86. *McCollum*, 58 M.J. at 340.

87. *Id.* at 340.

88. 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-martial is a legal policy question best addressed by the political and policy-making elements of the government.

Id. at 340, 342.

child under the exception to the marital-communications privilege.⁸⁹ Because the defendant’s sister-in-law was not a legally recognized ward of either spouse, the court found that the defendant correctly asserted that the marital-confidential-communications privilege protected his wife’s testimony.⁹⁰

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.⁹¹ In *Banks*, during a search of the defendant’s home, the authorities found a pornographic video of the defendant’s two-year-old grandson.⁹² The defendant was charged with criminal counts relating to “possession, production, transportation and receipt of images depicting minors engaged in sexually explicit conduct.”⁹³ During the trial, the defendant’s wife testified that the defendant had admitted to her that he made the video of their grandson.⁹⁴ Although the defendant objected, claiming the marital-communications privilege protected his wife’s testimony, the trial court allowed the wife’s testimony.⁹⁵ The defendant was found guilty; key to this ruling was the wife’s testimony.⁹⁶

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.”⁹⁷ The Ninth Circuit explained that when there was a child “functionally equivalent” to that of the natural child, the exception to the marital-communications privilege should extend.⁹⁸ However, in applying this narrowly drawn

89. *Id.* at 341.

90. *Id.* at 341, 343. While the court held that it was error to admit the wife’s testimony, the court found the error harmless. *Id.* at 343. 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.* 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. *Id.* at 344 (Crawford, J., concurring). Crawford found an overriding public policy interest which emphasized the importance of protecting children from abuse. *Id.* (citing *Dunn v. Superior Court*, 26 Cal. Rptr. 2d 365 (Ct. App. 1993) (interpreting the “child of either” language in California’s exception to the confidential-marital-communications privilege to include a foster child)).

91. 556 F.3d 967 (9th Cir. 2009).

92. *Id.* at 971.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 974 (citing *United States v. White*, 974 F.2d 1135, 1136 (9th Cir. 1992)).

98. *Id.* at 975 (“Considering the comparable familial ties, we conclude that violence against the

exception in *Banks*, the Ninth Circuit found that the exception to the marital-communications privilege should not extend in the instant case.⁹⁹ The court held that the grandson was not the functional equivalent of a natural child, despite the two-year-old grandson living with the defendant for six months.¹⁰⁰

Banks and *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 de facto child. No significant difference exists 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 a marriage that has been deeply compromised by the confessions of a criminal and deviant sexual act.¹⁰¹ Nevertheless, state laws and the federal courts are divergent in their application of exceptions to the confidential-marital-communications privilege in child-molestation cases.

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, in Part VI, surveys the

functional equivalent of a child should be afforded the same protections as violence against the birth or step-child of a married couple.”).

99. 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 is important to building strong extended families and improving society, it is not the type that creates the same overriding policy concerns that led us to limit the marital communications privilege to protect children of the marriage.

Id. at 976.

100. *Id.* 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. *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. *Id.* at 977–78.

101. *See infra* Part IV.

relevant law in all jurisdictions and divides the laws into three general categories (from narrowest to broadest).

1. 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 a criminal action in which one of them is charged with a crime against the person . . . of a child of either.”¹⁰² The child-of-either-spouse is the narrowest exception because it is only applicable in cases when a case concerns the abuse and molestation of a biological child or legally recognized child of either spouse.

Thirteen states have adopted this narrow exception.¹⁰³ Ten of these thirteen 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,¹⁰⁴ including foster children.¹⁰⁵

102. KAN. STAT. ANN. § 60-428(b)(3) (2005).

103. ALASKA R. EVID. 505(b)(2)(A); 725 ILL. COMP. STAT. ANN. 5/115-16 (West 2008); 735 ILL. COMP. STAT. ANN. 5/8-801 (West 2003); KAN. STAT. ANN. § 60-428(b)(3); MINN. STAT. ANN. § 595.02.1a (West 2010); N.H. R. EVID. 504; NEV. REV. STAT. ANN. § 49.295(2)(e)(1) (West 2004); N.J. STAT. ANN. § 2A:84A-17(2)(b) (West Supp. 2010); § 2A:84A-22 (West 1994); N.M. R. EVID. § 11-505(1); OHIO REV. CODE ANN. § 2317.02(D) (West Supp. 2009); § 2945.42 (West 2006); TENN. CODE ANN. § 24-1-201(b)(2) (West 2002); WASH. REV. CODE ANN. § 5.60.060(1) (West 2009); W. VA. CODE ANN. §§ 57-3-3, -4 (West 2002); WIS. STAT. ANN. § 905.05 (West 2000).

104. ALASKA R. EVID. 505(b)(2)(A); CAL. EVID. CODE § 972(e)(1) (West 2009); 725 ILL. COMP. STAT. ANN. 5/115-16; 735 ILL. COMP. STAT. ANN. 5/8-801; MINN. STAT. ANN. § 595.02(1)(a); NEV. REV. STAT. ANN. § 49.295(2)(e)(1); N.J. STAT. ANN. §§ 2A:84A-17(2)(b), -22; N.M. R. EVID. § 11-505(1); TENN. CODE ANN. § 24-1-201(b)(2); WASH. REV. CODE ANN. § 5.60.060(1); WIS. STAT. ANN. § 905.05; *see also* Appendix *infra* Part VI.

105. *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”); *Dunn v. Superior Court*, 26 Cal. Rptr. 2d 365, 367 (Ct. App. 1993) (extending child-of-either exception to foster children); *State v. Michels*, 414 N.W.2d 311, 316 (Wis. Ct. App. 1987) (holding same). 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 would not be served by affording protection to only those children of a family unit with legal or biological relationships. Rather, it is to ensure that those individuals, particularly minor children,

Four of the thirteen states in this category, however, have not yet specifically expanded their state statutes from biological or legal “child of either” to include de facto parental situations.¹⁰⁶

2. 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 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 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”¹⁰⁷ Eleven states and the District of Columbia fall into this category.¹⁰⁸

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 had been “visiting” the home for four days when the incident occurred.¹⁰⁹ However, courts should not have to apply such tortured reasoning to extend the exception; instead, all state legislatures should adopt the any-child exception.

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.

Michels, 414 N.W.2d at 315–16 (citations omitted).

106. KAN. STAT. ANN. § 60-428(b)(3); N.H. R. EVID. 504; OHIO REV. CODE ANN. §§ 2317.02(D), 2945.42; W. VA. CODE ANN. §§ 57-3-3, -4.; *see also* Appendix *infra* Part VI.

107. UTAH R. EVID. 502(4)(c) (emphasis added).

108. 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) (West Supp. 2010); HAW. REV. STAT. § 626-1(c) (West 2008); KY. R. EVID. 504(c)(2); ME. R. EVID. 504(d); N.D. R. EVID. 504(d); OKLA. STAT. ANN. tit. 12, § 2504(d) (West 2010); S.D. CODIFIED LAWS §§ 19-13-13, -15 (2004); UTAH R. EVID. 502(4)(c); VT. R. EVID. 504(d).

109. *Munson v. State*, 959 S.W.2d 391, 393 (Ark. 1998) (holding that exception to confidential-marital-communications privilege applied to child “residing” in home for a visit of four days).

3. 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 molestation¹¹⁰ 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.”¹¹¹ While adoption of the any-child exception is a relatively new trend,¹¹² currently twenty-five states have adopted this broad standard.¹¹³

In sum, the states are split. Approximately half have adopted the narrower exceptions—categories one and two—to the confidential-marital-communications privilege, and half have recently adopted the

110. 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.*, 42 PA. CONS. STAT. ANN. §§ 5913 (West 2000) (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) (Supp. 2009) (carving out an exception for all “criminal action[s]”); 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.”).

111. MISS. R. EVID. 504(d) (emphasis added).

112. *United States v. McCollum*, 58 M.J. 323, 341 (C.A.A.F. 2003) (noting 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”).

113. ARIZ. REV. STAT. ANN. § 12-2232(2); COLO. REV. STAT. ANN. § 13-90-107 (West Supp. 2009); § 14-13-310 (West 2005); § 18-6-401.1 (West 2004); CONN. GEN. STAT. ANN. §§ 53-21, 54-84a (West 2009); FLA. STAT. ANN. §§ 90.504(3)(b), 39.204 (West 1999); GA. CODE ANN. §§ 24-9-21(1), -23(b) (West 2003); IDAHO CODE ANN. § 9-203(1) (West 2006); IDAHO R. EVID. 504(D)(1); IND. CODE ANN. § 31-32-11-1 (West 2008 & Supp. 2010); § 34-46-3-1(4) (West 1999); IOWA CODE ANN. §§ 232.74, 622.9 (West 1999 & Supp. 2010); LA. CODE EVID. ANN. art. 504(c)(1), (4) (2006); LA. REV. STAT. ANN. § 14:403(B) (2004); MD. CODE ANN., CTS. & JUD. PROC. §§ 9-105, 9-106(a)(1) (West 2002); MASS. GEN. LAWS ANN. ch. 233, § 20 (West 2000); MICH. COMP. LAWS ANN. § 600.2162 (West Supp. 2010); MISS. R. EVID. 504(d); MO. ANN. STAT. §§ 210.140, 546.260(2) (West 2002); MONT. CODE ANN. §§ 26-1-802, 41-3-437(5) (2009); NEB. REV. STAT. ANN. § 27-505(3)(a) (West 2009); N.Y. C.P.L.R. 4502(b) (McKinney 2007); N.C. GEN. STAT. ANN. §§ 8-57(c), 8-57.1 (West 2000); OR. REV. STAT. ANN. § 40.255(4)(a) (West 2003); 42 PA. CONS. STAT. ANN. §§ 5913(2), 5923; R.I. GEN. LAWS §§ 9-17-13, 12-17-10.1 (West 2006); S.C. CODE ANN. § 19-11-30 (1985); TEX. EVID. RULE 504(a)(4)(C); VA. CODE ANN. § 8.01-398 (West Supp. 2010); § 19.2-271.2(iii) (2007); WYO. STAT. ANN. §§ 1-12-101(a)(iii), 14-3-210(a)(i) (West 2007).

broader any-child exception—category three.¹¹⁴ 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 federal 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 standard. The Tenth Circuit falls into category two—child-residing-in-the-home standard.¹¹⁵

The Tenth Circuit adopted the child-residing-in-the-home standard in the case *United States v. Bahe*.¹¹⁶ The defendant in *Bahe* molested an eleven-year-old female relative who was visiting the family household.¹¹⁷ At trial, the defendant's wife attempted to provide testimony concerning how the defendant engaged in sexual intercourse.¹¹⁸ This testimony was important to the government because this was the same allegation made by the eleven-year-old victim.¹¹⁹ The 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.¹²⁰

On appeal, the Tenth Circuit concluded that while the testimony constituted a confidential marital communication, it was subject to an exception.¹²¹ The court recognized that no other circuit had extended the exception beyond a case where the defendant was charged with an offense against the "children of either" spouse, which presented a problem in the current case because the child was a relative, not a biological child of either spouse.¹²² The court, however, held that no

114. See Appendix *infra* Part VI.

115. See *supra* Part III.B for further explanation of the categories.

116. 128 F.3d 1440, 1446 (10th Cir. 1997) (applying an exception to the confidential-marital-communications privilege when the communication concerns a crime against a "minor child within the household").

117. *Id.* at 1441.

118. *Id.*

119. *Id.*

120. *Id.* at 1445.

121. *Id.* at 1446.

122. *Id.* at 1445–46; see also *United States v. White*, 974 F.2d 1135, 1138 (9th Cir. 1992) (holding that an exception to the marital-communications privilege applied in a case where the

significant difference existed between a crime against the child of a spouse and the crime against a relative child in the home.¹²³ 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 and is often covered up by the innocence of small children and by threats against disclosure.¹²⁴

When this same issue was raised in the Ninth Circuit in *United States v. Banks*, the court refused to adopt the *Bahe* standard.¹²⁵ The Ninth Circuit criticized *Bahe* explaining: “No other circuit has adopted such a broad exemption to the federal marital communications privilege.”¹²⁶ After rejecting the *Bahe* standard, the Ninth Circuit adopted the narrowest exception, the child-of-either-spouse standard¹²⁷ and, thus, held the privilege did not apply to communications made by the defendant to his wife concerning the molestation of their grandson.¹²⁸ 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, a few other cases from district courts in other circuits are on point.¹²⁹ One district court in the Fifth Circuit, for example, has attempted to extend the exception to the any-child standard,¹³⁰ but it remains to be seen if the Fifth Circuit will follow

defendant was charged with a crime against the child of his wife).

123. *Bahe*, 128 F.3d at 1446.

124. *Id.* (citation omitted); *see also* *United States v. Castillo*, 140 F.3d 874, 884–85 (10th Cir. 1998) (citing *Bahe*, 128 F.3d at 1441) (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).

125. 556 F.3d 967, 975 n.3 (9th Cir. 2009).

126. *Id.*

127. *White*, 974 F.2d at 1138.

128. *Banks*, 556 F.3d at 976; *see also supra* Part III.A.

129. *See, e.g.*, *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” (quoting *White*, 974 F.2d at 1138)).

130. In *United States v. Martinez*, the wife attempted to claim privilege over communications she made to her husband concerning abuse of her children. 44 F. Supp. 2d 835, 836 (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 “children of either” spouse, the holding of the court was broader, adopting the any-child standard:

the lead of this district court. The next Part sets forth the analysis for how the Fifth Circuit, all other federal courts of appeals, and state legislatures should address 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 Part answers that question and then sets forth the legal analysis for how federal courts and state legislatures can justify adopting the any-child exception. There are four reasons why the any-child exception should be adopted.

1. Child Molestation Is a Unique Crime in that It Is Often Difficult to Prosecute Due to the Lack of Witness Testimony and Physical Evidence

The Supreme Court has recognized that child abuse is “one of the most difficult crimes to detect and prosecute.”¹³¹ There are a number of reasons why child molestation, in particular, is difficult to prosecute.¹³² First, there are often no witnesses to child sexual abuse except the child-victim.¹³³ If the child is young, like the two-year-old grandson in the

[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.

131. *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987); *see also In re Nicole V.*, 518 N.E.2d 914, 915 (N.Y. 1987) (stating that “once abuse is uncovered it is difficult to fix blame”); David M. De La Paz, *Sacrificing the Whole Truth: Florida’s Deteriorating Admissibility of Similar Fact Evidence in Cases of Child Sexual Abuse*, 15 N.Y.L. SCH. J. HUM. RTS. 449, 449 (1999) (explaining that “many cases of child sexual abuse are difficult for prosecutors to prove”); Meredith Felise Sopher, “*The Best of All Possible Worlds*”: *Balancing Victims’ and Defendants’ Rights in the Child Sexual Abuse Case*, 63 *FORDHAM L. REV.* 633, 643 (1994) (citing *Ritchie*, 480 U.S. at 39).

132. *See generally* ROBERT L. SNOW, *SEX CRIMES INVESTIGATION: CATCHING AND PROSECUTING THE PERPETRATORS* 109–29 (2006) (discussing the process of child-molestation investigations); CHERYL WETZSTEIN, *THE COMPLEX NATURE OF CHILD SEXUAL ABUSE* (2001).

133. *Ritchie*, 480 U.S. at 60 (finding that child abuse is hard to prosecute “in large part because

Banks case,¹³⁴ 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 courtroom¹³⁵ and is “particularly acute when the abuser is a parent.”¹³⁶ 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.¹³⁷ Because child sexual abuse generally occurs in secret, it is difficult to find witnesses.¹³⁸ Thus, to ensure prosecution of child molesters, anyone

there often are no witnesses except the victim”); Sopher, *supra* note 131, at 643.

134. *United States v. Banks*, 556 F.3d 967, 975–76 (9th Cir. 2009) (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* Part III.A of this Article addressing *Banks*.

135. Sopher, *supra* note 131, at 644; *see also In re Nicole V.*, 518 N.E.2d at 915 (asserting that victims are generally reluctant to testify in child sexual abuse cases); *State v. Jones*, 722 P.2d 496, 499 (Wash. 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”); KENNETH V. LANNING, *CHILD MOLESTERS: A BEHAVIORAL ANALYSIS* 90–91 (5th ed. 2010) (explaining that pedophiles will sometimes use pornography of the victim to blackmail the child, ensuring the child will keep the sexual abuse a secret); Peter T. Wendel, *The Case Against Plea Bargaining Child Sexual Abuse Charges: “Deja 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”); Michelle Ann Scott, Note, *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”).

136. *Ritchie*, 480 U.S. at 60.

137. Sopher, *supra* note 131, at 644–45; *see also Jones*, 772 P.2d at 499 (stating that “children’s memories of abuse may have dimmed with the passage of time”); Clara Gimenez, Note, *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) (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 an ‘ordinary’ parent would sexually abuse [their] child”); De La Paz, *supra* note 131, at 450 (explaining that child molesters “carefully select their victims and opportunities” to commit the crime, and as such, “child molesters 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”); Judy Yun, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1750–51 (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).

138. Sopher, *supra* note 131, at 643; *see also Tadic v. State*, 635 S.E.2d 356, 358 (Ga. Ct. App. 2006) (stating that “sexual offenses against children necessarily occur in secret”); *In re Nicole V.*, 518 N.E.2d at 915 (finding that because of the nonviolent nature of child sexual abuse, the abuse is generally in secret and is, therefore, difficult to detect); *Jones*, 772 P.2d at 499 (stating that “[a]cts of abuse generally occur in private”); De La Paz, *supra* note 131, at 449 (explaining that child sexual molestation is a “crime of opportunity” in which the assailant initiates the act when the assailant is

who can testify about child sexual abuse, including a spouse, should be allowed to testify.¹³⁹

Second, there is often little physical evidence in child-molestation cases.¹⁴⁰ The signs of physical molestation are rare because medical examinations only show “evidence of sexual abuse in twenty to thirty percent” of cases.¹⁴¹ 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.¹⁴² 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.¹⁴³ Finally, frequently delays in reporting abuse decrease the likelihood of any physical evidence.¹⁴⁴ 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.¹⁴⁵

alone with the child); 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”); Gimenez, *supra* note 137, at 234 (stating that secretiveness is an issue that surrounds child sexual abuse); Melissa R. Saad, Note, *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 137, at 1750 (explaining that generally the only witnesses in child sex abuse cases 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).

139. See, e.g., *People v. Allman*, 342 N.Y.S.2d 896, 899–900 (App. Div. 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”).

140. Sopher, *supra* note 131, at 644; see also *Jones*, 772 P.2d at 499 (stating that “many cases leave no physical evidence”); Wendel, *supra* note 135, at 322 (explaining that it is often the problem in child sexual abuse cases that there is “no independent physical evidence corroborating the [child’s] claim”); Yun, *supra* note 137, at 1749–50 (explaining that “physical corroboration is rare” because the child sexual abuse crimes are “predominantly nonviolent in nature”).

141. Sopher, *supra* note 131, at 644; see also Saad, *supra* note 138, at 603 (explaining that the symptoms of child sex abuse victims are varied and sometimes nonexistent).

142. De La Paz, *supra* note 131, at 449.

143. Yun, *supra* note 137, at 1750; see also LANNING, *supra* note 135, at 181 (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).

144. Sopher, *supra* note 131, at 644.

145. *Tadic v. State*, 635 S.E.2d 356, 358 (Ga. Ct. App. 2006) (asserting that “more often than not the child/victim is the only witness able to provide such direct evidence”); see also *In re Nicole V.*, 518 N.E.2d 914, 915 (N.Y. 1987) (finding that because of the secretive nature of the child sexual abuse, the child is usually the only witness); *Jones*, 772 P.2d at 499 (stating that “prosecutors must

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, no logical reason limits 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.”¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸ The societal benefit of marital harmony presumably resulting from free interspousal communication is deemed sufficiently important, on the whole, to outweigh the societal benefit of facilitating the fact-finding process in the judicial system.¹⁴⁹ The very act of child molestation, however, strikes at

rely on the testimony of the child victim to make their cases”); Yun, *supra* note 137, at 1749 (explaining that the child’s hearsay statement is often the only proof of the sexual abuse crime).

146. See, e.g., De La Paz, *supra* note 131, at 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); Yun, *supra* note 137, at 1749 (“[T]he principles underlying the hearsay rule require 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.”).

147. See *United States v. Banks*, 556 F.3d 967, 982 (9th Cir. 2009) (“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.’” (quoting *United States v. White*, 974 F.2d 1135, 1138 (9th Cir. 1992))).

148. *United States v. Porter*, 986 F.2d 1014, 1018 (6th Cir. 1993) (“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.” (quoting *United States v. Byrd*, 750 F.2d 585, 590 (7th Cir. 1989))).

149. See *id.*

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.¹⁵⁰ 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.¹⁵¹

Arguably, the insult to the spouse may be personally greater if it is his or her child that is molested by the other spouse.¹⁵² Regardless of the personal insult, however, 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.¹⁵³ 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.”¹⁵⁴ To argue the contrary—that confidentiality concerning 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.¹⁵⁵

150. *Cf.* *Trammel v. United States*, 445 U.S. 40, 52 (1980) (“When 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.”). This is certainly even more the case when a spouse is accused of child molestation.

151. *United States v. Allery*, 526 F.2d 1362 (8th Cir. 1975) (explaining that “a serious crime against a child is an offense against that family harmony”).

152. *United States v. Martinez*, 44 F. Supp. 2d 835, 836 (W.D. Tex. 1999) (“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.”).

153. *See United States v. McCollum*, 58 M.J. 323, 342 n.6 (C.A.A.F. 2003) (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).

154. *United States v. Bahe*, 128 F.3d 1440, 1446 (10th Cir. 1997).

155. *See* 1 BROWN ET AL., *supra* note 34, § 86, at 384; Story, *supra* note 59, at 280; Eileen A. Scallen, *Relational and Informational Privileges and the Case of the Mysterious Meditation Privilege*, 38 LOY. L.A. L. REV. 537, 559 (2004).

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.”¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ 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 exception to the confidential-marital-communications privilege should be adopted to protect society from harm.¹⁵⁹ “[A] contrary rule would make children a target population within the marital enclave.”¹⁶⁰

156. *Allery*, 526 F.2d at 1366; see also *Martinez*, 44 F. Supp. 2d 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.”).

157. Saad, *supra* note 138, at 604; see also CHILD MOLESTATION STATISTICS, <http://childsafetips.com.abouttips.com/child-molestation-statistics.php> (last visited Sept. 14, 2010) (asserting that the average molester will molest fifty girls before being caught and convicted).

158. Saad, *supra* note 138, at 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 INEQ. 435, 440–41 (1997)).

159. See *Martinez*, 44 F. Supp. 2d 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.”).

160. 25 WRIGHT & GRAHAM, *supra* note 34, § 5593, at 761.

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.¹⁶¹ 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.”¹⁶² Thus, as a matter of policy, many state legislatures and courts 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.¹⁶³ Indeed, a narrower application of the exception for children under the marital-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.¹⁶⁴

161. See *supra* Part III.B; see also Appendix *infra* Part VI (any-child category).

162. *United States v. Banks*, 556 F.3d 967, 982 (9th Cir. 2009) (Alarcón, J., dissenting) (“Since *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 v. United States*, 445 U.S. 40, 50 (1980))).

163. See, e.g., *id.* at 988 (“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.” (quoting *Villalta v. Commonwealth*, 702 N.E.2d 1148 (Mass. 1998))); *United States v. Bahe*, 128 F.3d 1440, 1446 (10th Cir. 1997) (“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.”).

164. See Kimberly Ann Connor, Note, *A Critique of the Marital Privileges: An Examination of the Marital Privileges in the United States Military Through the State and Federal Approaches to Marital Privileges*, 36 VAL. U. L. REV. 119, 167–68 (2001). 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.

B. How Federal Courts Can Adopt the Any-Child Exception

Although no federal 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.¹⁶⁵ Because it is a privilege, it is not “intended to facilitate the fact-finding process or to safeguard its integrity.”¹⁶⁶ Thus, the effect of the privilege “is clearly inhibitive; rather than facilitating the illumination of truth, [it] shut[s] out the light.”¹⁶⁷ Because the confidential-marital-communications privilege impedes the truth-seeking process by withholding relevant testimony, it must be “strictly construed.”¹⁶⁸

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 the common law . . . in the light of reason and experience.”¹⁶⁹ In “enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege,”¹⁷⁰ but rather to “provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.”¹⁷¹ Federal courts have interpreted this

165. *Id.*; see *supra* Part III.A.

166. 1 BROUN ET AL., *supra* note 34, § 72, at 339.

167. *Id.*

168. *United States v. Trammel*, 445 U.S. 40, 50–51 (1980); 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*, 759 A.2d 995, 1014 (Conn. 2000) (“[The privilege] is to be applied cautiously and with circumspection because it impedes the truth-seeking function of the adjudicative process.” (quoting *Babcock v. Bridgeport Hosp.*, 742 A.2d 322 (Conn. 1988))); Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1201–02 (noting that “every man’s evidence should be available in the administration of justice”).

169. FED. R. EVID. 501. Rule 501 adopted the language the United States Supreme Court used in *Wolfe*. See *United States v. Wolfe*, 291 U.S. 7, 12 (1934); see also *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996) (“The authors of the Rule [501] borrowed this phrase from our opinion in [*Wolfe*], 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.’” (quoting *Funk v. United States*, 290 U.S. 371, 383 (1933))).

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

171. *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 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 *Allery*, 526 F.2d at 1367 (Henley, J., dissenting).

language to mean that the extent of evidentiary privileges must undergo a balancing test.¹⁷² Thus, 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.¹⁷³

In *United States v. Allery*, the Eighth Circuit applied the balancing test to an analogous situation.¹⁷⁴ 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.¹⁷⁵ That issue is narrower than the issue addressed in 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.¹⁷⁶ *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.¹⁷⁷ Moreover, the underlying policy of each privilege is to protect the marital unit.¹⁷⁸ 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-testimony 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

172. *United States v. Banks*, 556 F.3d 967, 974 (9th Cir. 2009) (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)).

173. *Id.* (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").

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

175. *Id.* at 1363–64. The ruling in *Allery* occurred before the Supreme Court held in *Trammel* that the "witness-spouse alone has a privilege to refuse to testify adversely." *Trammel*, 445 U.S. at 53.

176. 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.").

177. See, e.g., *Trammel*, 445 U.S. at 46, n.7; see also *supra* Part II.A–B.

178. See, e.g., *United States v. Porter*, 986 F.2d 1014, 1018 (6th Cir. 1993) (noting that both the adverse-spousal-testimony privilege and the confidential-marital-communications privilege are meant to protect the marriage); see also *supra* Part II.A.

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.”¹⁷⁹

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 *any child* in child-molestation cases. As addressed in Part IV.A of this Article, the abuse of *any child* would have a negative impact on family harmony and society.¹⁸⁰ Moreover, communications between spouses comprise critical testimony, given the difficulty in successfully prosecuting child-molestation cases.¹⁸¹ 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.¹⁸² This last point alone is enough to tip the balancing scales in favor of adopting the any-child exception since federal courts are to consider consensus among state laws when applying Rule 501.¹⁸³

Given that courts should construe privileges 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-molestation cases, “principles of common law . . . in light of reason and

179. *Allery*, 526 F.2d at 1366–67.

180. *See supra* Part IV.A.2–3.

181. *See supra* Part IV.A.1.

182. *See supra* Parts III.B, IV.A.4; *see also* Appendix *infra* Part VI.

183. *See Jaffee v. Redmond*, 518 U.S. 1, 13 (1996) (“[I]t is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both ‘reason’ and ‘experience.’” (citing *Funk v. United States*, 290 U.S. 371 (1933))). In *Jaffee*, the Supreme Court created the new psychotherapist-patient-communications privilege. *Id.* at 12. 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.

Id. at 12–13 (citing *Trammel v. United States*, 445 U.S. 40, 48–50 (1980); *United States v. Gillock*, 445 U.S. 360, 368 n.8 (1980)).

experience¹⁸⁴ dictate that the any-child exception should be adopted by all federal courts.¹⁸⁵

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.¹⁸⁶ These jurisdictions should adopt the any-child exception for the public-policy reasons set forth above, including: child-molestation cases are difficult to prove, and, 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.¹⁸⁷ It is the responsibility of the legislatures to balance competing considerations in law.¹⁸⁸

A proposed law would track language similar to those states which have adopted the any-child exception.¹⁸⁹ The law could provide that a person has 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),¹⁹⁰ state laws should 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.¹⁹¹

184. FED. R. EVID. 501.

185. While the Ninth and Tenth Circuits are split as to what the exception to the confidential-marital-communications privilege should be, neither has sufficiently extended this exception to the any-child standard. Compare *United States v. Banks*, 556 F.3d 967, 976 (9th Cir. 2009) (adopting the child-of-either-spouse exception), with *United States v. Bahe*, 128 F.3d 1440, 1446 (10th Cir. 1997) (adopting the child-living-in-the-home exception); see also *supra* Part III.A, C.

186. See *supra* Part III.B; see also Appendix *infra* Part VI (child-of-either-spouse and child-living-in-the-home categories).

187. See *supra* Part IV.A.1–4.

188. See Scallen, *supra* 155, at 541 (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”).

189. See *supra* Part III.B; see also Appendix *infra* Part VI (any-child category).

190. See *supra* Part IV.A.1.

191. The age limit could be either sixteen or eighteen years of age depending on the state’s statutory rape law. See, e.g., ALA. CODE § 13A-6-62(a) (2010) (“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.”);

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.¹⁹² If all states would enact similar laws adopting the any-child exception less confusion would result. Parties would not be forced to litigate what constitutes de facto parental status¹⁹³ or what constitutes a child “living in the home.”¹⁹⁴ With the any-child exception it would be clear to a 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 privileges: (1) Wigmore’s “Instrumental Rationale” and (2) the “Humanistic Rationale.”¹⁹⁵ Each theory will be taken in turn.

1. Wigmore’s Instrumental Rationale

Courts often cite to Wigmore’s Instrumental Rationale when considering the application of evidentiary privileges.¹⁹⁶ 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.”¹⁹⁷ Under this theory, evidentiary privileges, given that

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.”).

192. See, e.g., *Jaffee v. Redmond*, 518 U.S. 1, 12–13 (1996) (explaining that it is appropriate for federal courts to consider state laws in analyzing evidentiary privileges); *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003) (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 de facto children); *In re Nicole V.*, 518 N.E.2d 914, 915 (N.Y. 1987) (“In recent years preventing sexual abuse of children in family settings has become a major social and judicial concern.”).

193. The de facto parental exception was the issue litigated in *Banks*. See *United States v. Banks*, 556 F.3d 967, 976 (9th Cir. 2009); see also *supra* Part III.A.

194. The child-living-in-the-home exception was the issue litigated in *Bahe*. See *United States v. Bahe*, 128 F.3d 1440, 1446 (10th Cir. 1997); see also *supra* Part III.C.

195. EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE—EVIDENTIARY PRIVILEGES* § 3.1, at 150–53, § 5.1.2, at 293–95 (Richard D. Friedman ed., 2002).

196. See, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399, 406 (1998); *Jaffee*, 518 U.S. at 9.

197. IMWINKELRIED, *supra* note 195, § 5.1.2 at 259.

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.¹⁹⁸

If a privilege fails to meet any of these four conditions, then it is not valid under the Instrumental Rationale.¹⁹⁹ By extension, the failure of an existing privilege to meet any one of these conditions could provide a basis to abrogate that privilege.²⁰⁰ 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.

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.²⁰¹ For 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.²⁰² The privilege may not meet the fourth condition for similar reasons. If the marital relationship is not based on a presumption of confidentiality, then a breach of the confidentiality would not be sufficiently detrimental to outweigh the interests in divulging the

198. 8 WIGMORE, *supra* note 54, § 2285, at 527; Story, *supra* note 59, at 305.

199. *Id.*

200. *See* Story, *supra* note 59, at 308.

201. *Id.* at 308 (“Indeed, Wigmore . . . questioned whether the instrumental model would support the case for a spousal privilege.”); *see also* IMWINKELRIED, *supra* note 195, § 3.2.3, at 136–37.

202. *See* Story, *supra* note 59, at 306. This privilege may be contrasted to the attorney-client relationship, in which the privilege is critical to maintaining the affiliation. *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. *See id.*; *see also* 1 BROUN ET AL., *supra* note 34, § 86, at 384 (explaining that “the probable benefits of the rule of privilege in encouraging marital confidences and wedded harmony are doubtful” 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, *supra* note 155, at 559; *Developments in the Law*, *supra* note 33, at 1579.

information at trial.²⁰³ 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 litigation purposes is significant. This is precisely the case with the use of the confidential-marital-communications privilege in child-molestation prosecutions. As stated earlier, for at least four reasons the interest in protecting children, regardless of their connection to the family unit, outweighs the benefit, if any, gained by allowing a person to invoke the privilege in child-molestation cases.²⁰⁴

2. The Humanistic Rationale

The Humanistic Rationale states that evidentiary privileges should be designed to protect individual rights.²⁰⁵ 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.²⁰⁶ 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.²⁰⁷ Moreover, if 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

203. See Story, *supra* note 59, at 308; see also 8 WIGMORE, *supra* note 54, § 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”).

204. See *supra* Part IV.A.

205. IMWINKELRIED, *supra* note 195, § 5.1.2, at 259.

206. See Raymond F. Miller, Comment, *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).

207. See Story, *supra* note 59, 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.”); 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”).

evidence is not otherwise obtainable.²⁰⁸ 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, an exception to the confidential-marital-communication privilege must exist.²⁰⁹

V. CONCLUSION

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.²¹⁰ 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.²¹¹

208. 1 BROUN ET AL., *supra* note 34, § 86, at 385 (“The humanistic need for creation of a private enclave within a marital relationship may not stand in the balance where there is a need for otherwise unobtainable evidence critical to the ascertainment of significant legal rights.”).

209. *See supra* Part IV.A.

210. *See supra* Part III; *see also* Appendix *infra* Part VI.

211. Although beyond the scope of this Article, given the common history and common underlying policy of both marital privileges, *see supra* Part 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, 1231–32 (10th Cir. 2005) (holding that the testifying spouse can invoke the adverse-spousal-testimony privilege in abuse of the defendant’s granddaughter).

2010]

PROTECTING “ANY CHILD”

37

VI. APPENDIX

Table 2: Summary of Exceptions to the Confidential-Marital-Communications Privilege in Child-Molestation Cases

Jurisdiction	Child-of-Either-Spouse Exception (Includes De Facto Parental Status) ²¹²	Child-Residing-in-the-Home Exception (De Facto Parental Status Unnecessary) ²¹³	Any-Child Exception ²¹⁴
FEDERAL			
9th Circuit	<i>United States v. Banks</i> , 556 F.3d 967, 975 (9th Cir. 2009).		
10th Circuit		<i>United States v. Bahe</i> , 128 F.3d 1440, 1446 (10th Cir. 1997).	
1st through 8th, 11th, and D.C. Circuits	No appellate cases on point. ²¹⁵		
Military Courts		MILITARY R. EVID. 504(d). ²¹⁶	
STATES			
Alabama		ALA. R. EVID. 504(d)(3)(B).	

212. See explanation of child-of-either-spouse exception *supra* Part III.B.1.

213. See explanation of child-residing-in-the-home exception *supra* Part III.B.2.

214. See explanation of any-child exception *supra* Part III.B.3.

215. While there is no appellate case on point for the First through Eighth Circuits, Eleventh Circuit, or D.C. Circuit, a few federal district court cases in these circuits address 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, 1138 (9th Cir. 1992))).

216. 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” spouse is a victim). Thus, Rule 504 broadened the exception to include children residing in the home that were not necessarily a child of either.

Jurisdiction	Child-of-Either-Spouse Exception (Includes De Facto Parental Status)²¹²	Child-Residing-in-the-Home Exception (De Facto Parental Status Unnecessary)²¹³	Any-Child Exception²¹⁴
Alaska	ALASKA R. EVID. 505(a)(2)(D)(ii). ²¹⁷		
Arizona			ARIZ. REV. STAT. ANN. § 12-2232(2) (Supp. 2009). ²¹⁸
Arkansas	ARK. R. EVID. 504(d). ²¹⁹		
California	CAL. EVID. CODE § 972(e)(1) (West 2009). ²²⁰		
Colorado			COLO. REV. STAT. ANN. § 13-90-107 (West Supp. 2009); § 14-13-310 (West 2005); § 18-6-401.1 (West 2004). ²²¹
Connecticut			CONN. GEN. STAT. ANN. §§ 53-21, ²²² 54-84a (West 2009). ²²³

217. See, e.g., *Daniels v. State*, 681 P.2d 341, 345 (Alaska Ct. App. 1984) (finding that the adverse-spousal-testimony privilege, the language of which is analogous to Alaska's confidential-marital-communications privilege, extended to a "foster child").

218. *State v. Salzman*, 679 P.2d 544, 546 (Ariz. Ct. App. 1984) (noting that, per section 13-3620(D) of the Arizona Revised Statutes, the marital privilege does not extend to cases where "a child's neglect, dependency, abuse or abandonment is an issue").

219. *Munson v. State*, 959 S.W.2d 391, 393 (Ark. 1998) (holding that an exception to confidential marital privilege applied to child "residing" in the household).

220. *People v. Siravo*, 21 Cal. Rptr. 2d 350, 352 (Ct. App. 1993) (stating that no marital privilege applies when there is a crime against a child or "cohabitant" of either spouse).

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

222. *But see Connecticut v. Scruggs*, 905 A.2d 24 (Conn. 2006) (holding Connecticut's risk to injury statute, section 53-21 of the General Statutes of Connecticut, unconstitutional on other grounds).

223. *State v. Christian*, 841 A.2d 1158, 1173 n.9 (Conn. 2004) (explaining no privilege for crime against child in custody or control).

Jurisdiction	Child-of-Either-Spouse Exception (Includes De Facto Parental Status)²¹²	Child-Residing-in-the-Home Exception (De Facto Parental Status Unnecessary)²¹³	Any-Child Exception²¹⁴
Delaware		DEL. R. EVID. 504(d). ²²⁴	
District of Columbia		D.C. CODE § 14-306(b)(1)(B) (Supp. 2010). ²²⁵	
Florida			FLA. STAT. ANN. §§ 90.504(3)(b), 39.204 (West 1999). ²²⁶
Georgia			GA. CODE ANN. §§ 24-9-21(1), -23(b) (West 2003). ²²⁷
Hawaii		HAW. R. EVID. 505(c). ²²⁸	
Idaho			IDAHO CODE ANN. § 9-203(1) (West 2006); IDAHO R. EVID. 504(d)(1). ²²⁹

224. *State v. Howard*, 728 A.2d 1178, 1179 n.3 (Del. Super. Ct. 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).

225. *See also* D.C. CODE § 22-3024 (Supp. 2010) (“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 section 14-306(b)(1)(B) of the District of Columbia Code 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.” *Id.* § 14-306(b)(1)(B).

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

227. *Nichols v. State*, 653 S.E.2d 300, 305 (Ga. Ct. App. 2007) (holding that marital privilege does not apply to crimes against a minor child).

228. *See, e.g., State v. Okubo*, 53 P.3d 1204, 1207 (Haw. Ct. App. 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).

229. *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).

Jurisdiction	Child-of-Either-Spouse Exception (Includes De Facto Parental Status) ²¹²	Child-Residing-in-the-Home Exception (De Facto Parental Status Unnecessary) ²¹³	Any-Child Exception ²¹⁴
Illinois	725 ILL. COMP. STAT. ANN. 5/115-16 (West 2008); 735 ILL. COMP. STAT. ANN. 5/8-801 (West 2003). ²³⁰		
Indiana			IND. CODE ANN. § 31-32-11-1 (West 2008 & Supp. 2010); § 34-46-3-1(4) ²³¹ (West 1999).
Iowa			IOWA CODE ANN. §§ 232.74, 622.9 (West 1999 & Supp. 2010). ²³²
Kansas	KAN. STAT. ANN. § 60-428(b)(3) (2005). ²³³		
Kentucky		KY. R. EVID. 504(c)(2)(c). ²³⁴	

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

231. *Deasy-Leas v. Leas*, 693 N.E.2d 90, 96 (Ind. Ct. App. 1998) (holding that child abuse and neglect are exceptions to privileged communications), *abrogated on other grounds by* *Martin v. State*, 774 N.E.2d 43 (Ind. 2002).

232. *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”).

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

234. *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).

Jurisdiction	Child-of-Either-Spouse Exception (Includes De Facto Parental Status)²¹²	Child-Residing-in-the-Home Exception (De Facto Parental Status Unnecessary)²¹³	Any-Child Exception²¹⁴
Louisiana			LA. CODE EVID. ANN. art. 504(c)(1), (4) (2006); LA. REV. STAT. ANN. § 14:403(B) (2004). ²³⁵
Maine		ME. R. EVID. 504(d).	
Maryland			MD. CODE ANN., CTS. & JUD. PROC. §§ 9-105, 9-106(a)(1) (West 2002). ²³⁶
Massachusetts			MASS. GEN. LAWS ANN. ch. 233, § 20 (West 2000). ²³⁷
Michigan			MICH. COMP. LAWS ANN. § 600.2162 (West Supp. 2010). ²³⁸
Minnesota	MINN. STAT. ANN. § 595.02(a) (West 2010). ²³⁹		

235. Section 14:403(B) of the Louisiana Revised Statutes 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.”

236. *See, e.g., Mulligan v. State*, 252 A.2d 476, 485 (Md. Ct. Spec. App. 1969) (holding that spouse is a compellable witness when the criminal proceedings involve the abuse of a child).

237. *Villalta v. Commonwealth*, 702 N.E.2d 1148, 1152 (Mass. 1998) (holding the marital privilege inapplicable when criminal conduct involves abuse of any child).

238. *People v. Simpson*, 347 N.W.2d 215, 217 (Mich. Ct. App. 1984) (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”), *vacated on other grounds by People v. Petrella*, 380 N.W.2d 11 (1986).

239. *State v. Willette*, 421 N.W.2d 342, 347 (Minn. Ct. App. 1988) (holding no marital privilege applies in cases of “sexual abuse of a child by a person responsible for, or in a position of authority over, that child”).

Jurisdiction	Child-of-Either-Spouse Exception (Includes De Facto Parental Status) ²¹²	Child-Residing-in-the-Home Exception (De Facto Parental Status Unnecessary) ²¹³	Any-Child Exception ²¹⁴
Mississippi			MISS. R. EVID. 504(d). ²⁴⁰
Missouri			MO. ANN. STAT. §§ 210.140, 546.260(2) (West 2002). ²⁴¹
Montana			MONT. CODE ANN. §§ 26-1-802, 41-3-437(5) (2009). ²⁴²
Nebraska			NEB. REV. STAT. ANN. § 27-505(3)(a) (West 2009). ²⁴³
Nevada	NEV. REV. STAT. ANN. § 49.295(2)(e)(1) (West 2004). ²⁴⁴		
New Hampshire	N.H.R. EVID. 504. ²⁴⁵		

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

241. Section 210.140 of the Missouri Statutes provides in relevant part: “Any legally recognized privileged communication, except that between attorney and client or involving communications made to a minister or clergy person, shall not apply to situations involving known or suspected child abuse or neglect”

242. *In re 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”).

243. *State v. Vicars*, 299 N.W.2d 421, 427 (Neb. 1980) (holding no privilege in statutory rape case).

244. *Meador v. State*, 711 P.2d 852, 854 (Nev. 1985) (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”).

245. *State v. Pelletier*, 818 A.2d 292, 298 (N.H. 2003) (recognizing a public policy limitation to N.H. Evid. Rule 504 for cases involving a “child of either” as a victim of the crime).

Jurisdiction	Child-of-Either-Spouse Exception (Includes De Facto Parental Status)²¹²	Child-Residing-in-the-Home Exception (De Facto Parental Status Unnecessary)²¹³	Any-Child Exception²¹⁴
New Jersey	N.J. STAT. ANN. § 2A:84A-17(2)(b) (West Supp. 2010); § 2A:84A-22 (West 1994).		
New Mexico	N.M. STAT. ANN. § 38-6-6 (West 2010); N.M. R. EVID. 11-505(1). ²⁴⁶		
New York			N.Y. C.P.L.R. § 4502(b) (McKinney 2007). ²⁴⁷
North Carolina			N.C. GEN. STAT. ANN. §§ 8-57.1(c), 8-57.1 (West 2000).
North Dakota		N.D. R. EVID. 504(d).	
Ohio	OHIO REV. CODE ANN. § 2317.02(D) (West Supp. 2009); § 2945.42 (West 2006). ²⁴⁸		

246. *State v. Howell*, 596 P.2d 277, 278 (N.M. Ct. App. 1979) (holding that the 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).

247. *People v. Allman*, 342 N.Y.S.2d 896, 899 (App. Div. 1973) (recognizing public policy limitation for cases where “any child” is a victim of the crime).

248. *See also* OHIO R. EVID. 501 (“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*, No. 12-05-20, 2006 WL 1062103, at *3 (Ohio Ct. App. Apr. 24, 2006) (holding that the marital privilege did not apply when charge was rape of couple’s daughter). *But cf.* *Akron v. Hockman*, 759 N.E.2d 1286, 1288 n.3 (Ohio Ct. App. 2001) (explaining that the spousal-testimony privilege portion of section 2945.42 of the Ohio Revised Code 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” OHIO R. EVID. 601(B).

Jurisdiction	Child-of-Either-Spouse Exception (Includes De Facto Parental Status)²¹²	Child-Residing-in-the-Home Exception (De Facto Parental Status Unnecessary)²¹³	Any-Child Exception²¹⁴
Oklahoma		OKLA. STAT. ANN. tit. 12, § 2504(D)(3) (West 2010).	
Oregon			OR. REV. STAT. ANN. § 40.255(4)(a) (West 2003). ²⁴⁹
Pennsylvania			42 PA. CONS. STAT. ANN. §§ 5913(2), (4), 5923 (West 2000). ²⁵⁰
Rhode Island			R.I. GEN. LAWS ANN. §§ 9-17-13, 12-17-10 (West 2006). ²⁵¹
South Carolina			S.C. CODE ANN. § 19-11-30 (1985)
South Dakota		S.D. CODIFIED LAWS §§ 19-13-13, -15(3) (2004).	
Tennessee	TENN. CODE ANN. § 24-1-201(b)(2) (West 2002). ²⁵²		

249. *State v. Suttles*, 597 P.2d 786, 789 (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).

250. Title 42, section 5913 of the Pennsylvania Consolidated Statutes apply 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.

251. Section 12-17-10 of the General Laws of Rhode Island abolishes 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 (R.I. 1979) (holding that section “12-17-10 has altered the common-law privilege of confidential communications between a husband and wife”).

252. *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 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”).

Jurisdiction	Child-of-Either-Spouse Exception (Includes De Facto Parental Status)²¹²	Child-Residing-in-the-Home Exception (De Facto Parental Status Unnecessary)²¹³	Any-Child Exception²¹⁴
Texas			TEX. EVID. RULE 504(a)(4)(C). ²⁵³
Utah		UTAH R. EVID. 502(b)(4)(C)(iii). ²⁵⁴	
Vermont		VT. R. EVID. 504(d).	
Virginia			VA. CODE ANN. §§ 8.01-398, 19.2-271.2(iii) (West Supp. 2010).
Washington	WASH. REV. CODE ANN. § 5.60.060(1) (West 2009). ²⁵⁵		
West Virginia	W. VA. CODE ANN. §§ 57-3-3, 57-3-4 (West 2002). ²⁵⁶		
Wisconsin	WIS. STAT. ANN. § 905.05(3)(b) (West 2000). ²⁵⁷		
Wyoming			WYO. STAT. ANN. §§ 1-12-101(a)(iii), 14-3-210(a)(i) (West 2007).

253. *Rodriguez v. State*, No. 14-07-00307-CR, 2008 WL 442577, at *4 (Tex. Crim. App. Feb. 19, 2008) (holding that the marital privilege was abrogated when crime was against a minor).

254. *State v. Widdison*, 4 P.3d 100, 111–12 (Utah Ct. App. 2000) (holding that marital privilege did not apply when crime was against child living in household of husband).

255. *State v. Wood*, 758 P.2d 530, 533 (Wash. Ct. App. 1988) (holding no marital privilege where defendant was “guardian” of child for purposes of the statute).

256. *State v. Delaney*, 417 S.E.2d 903, 906 (W. Va. 1992) (holding that the marital privilege did not apply when charge was sexual assault of couple’s child).

257. *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”).