To Catch a Predator or to Save His Marriage: Advocating for an Expansive Child Abuse Exception to the Marital Privileges in Federal Courts

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NOTES

TO CATCH A PREDATOR OR TO SAVE HIS MARRIAGE: ADVOCATING FOR AN EXPANSIVE CHILD ABUSE EXCEPTION TO THE MARITAL PRIVILEGES IN FEDERAL COURTS

Emily C. Aldridge*

In prosecutions for child abuse, the government's most valuable witness is often the defendant's spouse. Ordinarily, the marital privileges allow a witness to refuse to testify or a defendant to bar his or her spouse’s testimony. When a defendant is on trial for a crime committed against a child, however, the privileges are unavailable. Although this exception aims to serve justice on behalf of innocent children, its applicability often hinges on the relationship between perpetrator and victim. In some federal courts, the minor victim must be the child or stepchild of the defendant, while others have held the exception applicable even when the child is not related to the defendant. This Note addresses the injustice inherent in such a distinction, which protects some child victims of abuse better than others. Beginning with a background of the child abuse exception in federal courts, this Note then presents the current forms of the exception across the federal courts of appeals as well as in military courts-martial. Ultimately, this Note concludes that because the effective prosecution of child abusers is more important than the preservation of the defendant’s marriage, all federal courts should adopt an exception that would eliminate the marital privileges in prosecutions for the abuse of any child, regardless of the child’s relationship to the defendant.

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* J.D. Candidate, 2011, Fordham University School of Law. I would like to thank my advisor, Professor James Kainen, for providing thoughtful insight. I am also grateful to Judge Denny Chin for being an inspiring mentor.
On May 10, 2005, detectives in Edmonton, Canada, executed a search warrant at twenty-nine-year-old Shon Lindstrom’s house, resulting in the seizure of numerous violent and graphic videos and pictures depicting the
sexual abuse of children as young as newborns. After Lindstrom’s arrest, which led to twelve charges against him related to child pornography and the sexual abuse of four Canadian children, Lindstrom cooperated with Canadian investigators. Lindstrom’s tips led to an international probe that resulted in more than sixty arrests in Canada, the United States, Great Britain, Europe, and Australia.

One of the arrests made was that of Jerry Levis Banks, the American moderator and host of an Internet chat room called “Kid Sex and Incest.” Banks, a convicted sex offender, used the chat room to find other pedophiles and child pornographers, including Lindstrom. Lindstrom told police that Lindstrom had videotaped himself sexually abusing his stepchildren and sent the videos over the Internet to Banks. In return, Lindstrom said, Banks sent him videos via the Internet of Banks sexually abusing his grandson. Videos on Lindstrom’s computer corroborated his story.

A Federal Bureau of Investigation (FBI) agent, following Lindstrom’s tip, contacted a detective in Florida who was trained to pose undercover on websites such as the “Kid Sex and Incest” chat room. The detective posed as Lindstrom and entered the chat room to obtain information about Banks, subsequently discovering numerous child pornography files available for download from other users. FBI agents subsequently executed a search warrant at Banks’s house in Boise, Idaho, where agents seized Banks’s computer and electronic storage devices.

Following a bench trial, Banks was convicted of the possession, production, transportation, and receipt of images of child pornography.


2. Loyie, supra note 1.


8. Id. at *1–2.

9. Id. at *2.

10. Id. at *3.

11. Id.

12. Id.

13. See United States v. Banks, 556 F.3d 967, 971 (9th Cir. 2009); Waiver of Trial by Jury and Waiver of Special Findings of Facts at 1, United States v. Banks, No. 1:06-cr-00051-BLW-WBS (D. Idaho Nov. 13, 2006).
The U.S. District Court for the District of Idaho sentenced him to life in prison without parole, plus sixty years.\(^{15}\)

Banks appealed the district court’s admission of the testimony of his wife, Kathryn Banks, arguing that her testimony was inadmissible under the federal common-law testimonial privilege allowing a defendant to prevent his or her spouse from testifying about a confidential communication the defendant made to the witness-spouse.\(^{16}\) The U.S. Court of Appeals for the Ninth Circuit agreed,\(^{17}\) rejecting the district court’s admission of Kathryn Banks’s testimony under an exception to the privilege providing that the “privilege should not apply to statements relating to a crime where a spouse or a spouse’s children are the victims.”\(^{18}\) The district court had reasoned that even when the victim was the defendant’s grandchild and not his own child, society’s strong interest in prosecuting a child abuser prevailed over protecting a marriage the court perceived as damaged beyond repair.\(^{19}\) The Ninth Circuit, however, held that this child abuse exception to the marital communications privilege did not apply in cases of abuse of grandchildren.\(^{20}\)

In so holding, the Ninth Circuit established precedent that threatens to undermine future federal prosecutions of defendants who have abused unrelated children or young relatives other than their children. Unfortunately, these scenarios of abuse are fairly common, and defendants inevitably attempt to bar incriminating testimony of their spouses whenever possible.\(^{21}\) Society’s interest in successfully prosecuting defendants who have abused children, both sexually and physically,\(^{22}\) outweighs the public interests at stake. In particular, experts agree that the prevalence of sexual abuse in the United States is alarming. The majority of child abuse cases involve sexual abuse.\(^{23}\) As such, the Ninth Circuit’s ruling that the marital communications privilege does not apply in cases of nonsexual abuse of unrelated children or grandchildren is of concern. Additionally, the Ninth Circuit’s ruling is problematic because it creates an exception to the marital communications privilege that is sometimes conflicting, sometimes vague, and sometimes impossible to apply. This Note focuses on the public interest in successfully prosecuting sexual child abuse cases and, in turn, focuses on the Ninth Circuit’s ruling as it relates to sexual abuse of grandchildren.

This Note refers to a number of sources, which are cited below. This Note discusses three exceptions to the marital communications privilege, as well as the Ninth Circuit’s ruling that did not apply the child abuse exception in the case of abuse of grandchildren. This Note refers to the Ninth Circuit’s ruling as the “child abuse exception.”

This Note attempts to use gender-neutral language whenever possible, at certain points—for example, in the Note’s title—it has proven impossible. The choice to refer to the defendant-spouse as male at these points reflects the sobering fact that in reported cases of sexual abuse, on which this Note focuses, the vast majority of defendants have been males.


\(^{16}\) Banks, 556 F.3d at 974; see also BLACK’S LAW DICTIONARY 1318 (9th ed. 2009) (defining the marital communications privilege).

\(^{17}\) Banks, 556 F.3d at 977.

\(^{18}\) Id. at 974 (quoting United States v. White, 974 F.2d 1135, 1138 (9th Cir. 1992)). This Note refers to this exception as the “child abuse exception.”

\(^{19}\) Id. at 975–76.

\(^{20}\) Id.

\(^{21}\) See infra Part II.

\(^{22}\) Although the majority of cases cited by this Note were prosecutions for sexual abuse of children, this does not reflect on the applicability of the child abuse exception in cases of nonsexual abuse. Rather, it relates to the fact that in cases of abuse of an unrelated child, seventy-eight percent of the cases relate to sexual abuse. See U.S. DEP’T OF HEALTH & HUMAN SERVS., MALE PERPETRATORS OF CHILD MALTREATMENT: FINDINGS FROM NCANDS 20 tbl.5 (2005), available at http://aspe.hhs.gov/hsp/05/child-maltreat/report.pdf. This Note’s reasoning is also especially pertinent in cases of sexual abuse of minors because of the morally abhorrent nature of the crime, which further justifies the abrogation of the privilege.

In addition, although this Note attempts to use gender-neutral language whenever possible, at certain points—for example, in the Note’s title—it has proven impossible. The choice to refer to the defendant-spouse as male at these points reflects the sobering fact that in reported cases of sexual abuse, on which this Note focuses, the vast majority of
policy underlying the marital privileges. To preempt courts that may rely on United States v. Banks23 to exclude a spouse’s testimony in child abuse prosecutions, this Note proposes that federal courts adopt an expansive child abuse exception to the marital privileges that would apply in cases of abuse of any minor, regardless of the child’s relationship to the defendant.

An expansive child abuse exception would accomplish two important goals. First, it would serve justice to victims and society at large by assisting the government in crafting effective prosecutions and securing convictions of guilty child abusers. Second, by sending child abusers to prison, it would prevent future instances of abuse, both by keeping the criminal away from children during his or her term of imprisonment and by deterring him or her with the belief that a future prosecution will result in another conviction.

To familiarize the reader with the federal common law of marital privileges, this Note first presents a brief overview of all testimonial privileges,24 followed by a history and analysis of Federal Rule of Evidence 501, the only Rule of Evidence related to privileges, and one that provides only minimal guidance to courts developing laws of privilege.25 Part I then details the development of the marital privileges available to defendants and their spouses in federal courts,26 accompanied by a summary of the most commonly cited rationales for the existence of the marital privileges.27 Part I concludes by outlining the exceptions to the marital privileges courts have created,28 explaining the history of the child abuse exception,29 and listing the current forms of the exception, which vary among jurisdictions.30

Part II uses the Ninth Circuit’s surprising decision in Banks to study the various approaches of federal courts regarding the child abuse exception. Part II first examines the application of the child abuse exception in the Ninth Circuit as stated in Banks,31 and offers support from the U.S. Court of Appeals for the Eighth Circuit, the proposed Federal Rules of Evidence, and the Uniform Rules of Evidence.32 Next, Part II discusses the child abuse exceptions used in military courts-martial, the U.S. Court of Appeals for the Tenth Circuit, and the U.S. District Court for the Western District of Texas.
all of which have adopted child abuse exceptions broader than those of the Eighth and Ninth Circuits. Part II concludes by providing support for these forms of the child abuse exception in state court decisions and in the work of legal commentators.

This Note ultimately recommends that all federal courts adopt an expansive form of the child abuse exception that would invalidate the marital privileges in all proceedings related to the abuse of any child, regardless of the child's relationship with the defendant or the defendant's spouse. This suggested approach, although unprecedented in its breadth of protection, is appropriate because the medley of child abuse exceptions in federal courts is the result of inconsistent applications of Federal Rule of Evidence 501. An all-inclusive child abuse exception falls well within the guidelines provided by Federal Rule of Evidence 501. Part III balances the policies underlying the marital privileges with those behind the privileges' exceptions and concludes that society's great interest in admitting a witness-spouse's testimony against a defendant-spouse always outweighs the benefits of the marital privileges in cases of child abuse.

I. THE CHILD ABUSE EXCEPTION TO THE MARITAL PRIVILEGES

Part I of this Note traces the evolution of the child abuse exception to the marital privileges in federal courts. Part I.A provides the reader with a description of the confines of the marital privileges, as developed by federal courts and as codified in the Federal Rules of Evidence. Part I.B then details the common-law child abuse exception to the marital privileges.

A. The Two Marital Privileges

Part I.A.1 gives a brief overview of testimonial privileges at federal common law. Part I.A.2 goes on to explain why the Federal Rules of Evidence do not include specific rules about privileges. Next, Part I.A.3 defines the two types of marital privileges: the adverse spousal testimony privilege and the marital communications privilege. Finally, Part I.A.4 details courts' rationales for the existence of the marital privileges.

1. A Brief Overview of Testimonial Privileges

A testimonial privilege bars a court from compelling testimony from a witness in a professional or confidential relationship with a party in a court proceeding. A testimonial privilege may be held by the witness, who may
invoke the privilege to refuse to testify, or by the party, who may invoke the privilege to prevent a witness from testifying.40

Privileges are unusual in the realm of evidentiary law because they hinder, rather than facilitate, the judiciary's search for truth by excluding accurate, reliable evidence that sometimes is otherwise unattainable.41 Society, however, views privileged relationships as so valuable that they justify impeding the search for truth.42 This concept, though heavily criticized,43 is firmly entrenched in judicial systems across the world and has been traced back to ancient Rome.44 In creating privileges, courts and legislatures emphasize the importance of "encouraging the free flow of information"45 and protecting "privacy, freedom, trust, and honor in personal and professional relationships."46 Examples of relationships that merit such protection are those between attorneys and clients,47 priests and penitents,48 psychotherapists and patients,49 and, most importantly for the purposes of this Note, husbands and wives.50

Privileges: Hardly a New or Revolutionary Concept, 28 WM. & MARY L. REV. 583, 586 (1987); see also BLACK'S LAW DICTIONARY, supra note 16, at 1316–19 (defining privileges).


41. See Watts, supra note 39, at 586–87; cf. FED. R. EVID. 102 (stating that the Federal Rules of Evidence aim to ascertain the truth and encourage "justly determined" proceedings).

42. See Watts, supra note 39, at 587; Connor, supra note 40, at 131.


44. See JOHN APPLETON, THE RULES OF EVIDENCE: STATED AND DISCUSSED 144–45 (Phila., T. & J. W. Johnson & Co. 1860) (citing ancient Roman, Scottish, and Muslim laws that prohibited witnesses "united by the ties of relationship, of friendship, or of mutual dependence and support" to a party at trial from testifying). For a thorough historical overview of the development of evidentiary privileges in U.S. law, see Watts, supra note 39, at 586–90.

45. Connor, supra note 40, at 132–33.

46. Id.


48. See Trammel v. United States, 445 U.S. 40, 51 (1980) ("The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.").

49. See, e.g., Jaffee v. Redmond, 518 U.S. 1, 15 (1996) (recognizing a privilege protecting confidential communications between a licensed psychotherapist and his or her patient in the course of diagnosis or treatment).

50. See, e.g., Trammel, 445 U.S. at 42–53; United States v. Marashi, 913 F.2d 724 (9th Cir. 1990).
2. The Failed Codification of Privileges

The Federal Rules of Evidence (the Rules) codify federal common-law rules of evidence. The Rules, however, do not codify specific privileges, which are the "last bastion of the federal common law of evidence."\(^5\)

In 1961, the Judicial Conference of the United States\(^5\) authorized Chief Justice Earl Warren to appoint a Special Committee on Evidence to decide whether the formation of uniform federal rules of evidence was advisable and feasible.\(^5\) On December 11, 1961, the Special Committee submitted its report recommending the promulgation of rules of evidence for use in federal courts.\(^5\) On March 8, 1965, Chief Justice Warren appointed the Advisory Committee on Evidence Rules (Advisory Committee)\(^5\) to draft federal rules of evidence and submit them to the Committee on Rules of Practice and Procedure (Standing Committee), the Judicial Conference, and the U.S. Supreme Court for approval.\(^5\) The proposed rules would finally take effect upon Congress’s review and approval.\(^5\)

On March 31, 1969, four years after Chief Justice Warren’s commission of a draft of federal rules of evidence, the Standing Committee published and circulated the first draft of the Rules, accompanied by explanatory notes.

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52. Each state has developed its own evidentiary common law that is distinct from federal common laws of evidence, though the two may coincide. See Mueller & Kirkpatrick, supra note 39, § 5.7. Most states have codified the common law developed by the courts of the state. See, e.g., infra notes 209–14 and accompanying text (listing state privilege laws, both codified in statutes and developed in courts).


58. See id.
of the Advisory Committee. Lawyers and judges had one year in which to submit their comments and proceeded to publish numerous comments about the first draft, resulting in revised drafts in March 1971, October 1971, and November 1972 (the Final Revised Draft).

The Court sent the Final Revised Draft to Congress for approval, after which the Rules would go into effect on July 1, 1973. When the Subcommittee on Criminal Justice of the House Judiciary Committee held six days of hearings on the proposed Rules, however, the issue of privileges proved divisive, stalling proceedings. Article V, which codified common-law evidentiary privileges, contained thirteen rules, nine of which defined specific privileges to be recognized by federal courts: required reports, lawyer-client, psychotherapist-patient, husband-wife, adverse testimony, clergy-penitent, political vote, trade secrets, and secrets of

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63. Although no official citation of this draft of the Rules is available, a copy of the minutes of the September 30–October 1, 1971 meeting of the Standing Committee, which details the Committee’s responses to suggested amendments, is available. See Standing Comm. on Rules of Practice and Procedure, Meeting Minutes (Sept. 30–Oct. 1, 1971), available at http://www.uscourts.gov/rules/Minutes/ST09-1971-min.pdf.


66. See 120 CONG. REC. 40,891 (1974) (statement of Rep. Hungate) (“Without doubt, the privilege section of the rules of evidence generated more comment or controversy than any other section. I would say that fifty percent of the complaints received by the Criminal Justice Subcommittee related to the privilege section.”). In fact, after it became clear that members of Congress would not be able to reach consensus on the Rules by July, they enacted a bill to delay the effective date of the Rules until “expressly approved by Act of Congress.” See H.R. 3694, 93d Cong. (1973); House Holds Up Code of Evidence: Imposition of New Rules for Federal Courts Delayed, N.Y. TIMES, Mar. 15, 1973, at 19 (citing controversial provisions in the Code, including the husband-wife and doctor-patient privileges, as reasons for Congress’s desired delay).


68. See id. at 234–35.

69. See id. at 235–40.

70. See id. at 240–44.

71. See id. at 244–47; infra notes 95–130 (discussing the adverse spousal testimony privilege, one of two types of marital privileges).
state and other official information,\textsuperscript{75} and identity of informer.\textsuperscript{76} Rule 501 of the Final Revised Draft specified that any alleged privilege not enumerated in Article V, including the marital communications privilege,\textsuperscript{77} was thereby eliminated and could not be given effect unless of constitutional dimension.\textsuperscript{78}

At the hearings, members of Congress heard objections to the codification of federal privileges\textsuperscript{79} and the content of the specific privileges,\textsuperscript{80} including the reduction in the scope of marital privileges.\textsuperscript{81} The ensuing dispute over the privileges threatened to undercut the codification of any federal rules of evidence.\textsuperscript{82}

After two years of fruitless debate, Congress decided to omit precise rules about evidentiary privileges from the Rules,\textsuperscript{83} leaving Rule 501 as the
only mention of privileges in the Federal Rules of Evidence.\textsuperscript{84} Rule 501 provides that “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.”\textsuperscript{85} Rule 501 addressed objections to the Rules’ feared usurpation of state privilege laws\textsuperscript{86} by instructing that “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, [privileges] shall be determined in accordance with State law.”\textsuperscript{87}

Congress clarified that the decision not to codify privileges was not meant to convey disapproval of the concept of privileges in either state or federal courts.\textsuperscript{88} To the contrary, Congress wished privileges to remain in their current common-law forms unless modified by the federal courts.\textsuperscript{89}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{84} See Fed. R. Evid. 501.
\item \textsuperscript{85} Id. The language of Rule 501 originated in Benson v. United States, 146 U.S. 325 (1892), in which the U.S. Supreme Court reexamined the issue of whether a codefendant was competent to testify against an accused. \textit{Id.} at 336. The Court stated that it was not “precluded by [precedent] from examining this question in the light of general authority and sound reason.” \textit{Id.} at 335. The phrase evolved into “reason and experience” in Wolfie v. United States, 291 U.S. 7 (1934), in which the Supreme Court held that evidentiary rules are “governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience.” \textit{Id.} at 12 (citing Funk v. United States, 290 U.S. 371 (1933)).
\item \textsuperscript{87} Fed. R. Evid. 501. This provision left state privilege law applicable in both state criminal and civil proceedings and in federal civil proceedings governed by state law. See \textit{id.}; Mueller & Kirkpatrick, \textit{supra} note 39, § 5.7 (explaining when state privilege law applies). Problems arise when state and federal privilege laws conflict and a federal court is trying both state and federal claims, but in such cases, courts have held that federal privilege law applies to all claims to reduce confusion. See \textit{2 Stephen A. Saltzburg et al., Federal Rules of Evidence Manual} § 501.02[3], at 501–11 (9th ed. 2006) (citing Hancock v. Hobbs, 967 F.2d 462 (11th Cir. 1992)).
\item \textsuperscript{88} See S. Rep. No. 93-1277, at 13, \textit{reprinted in} 1974 U.S.C.C.A.N. at 7059 (“It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules.”); 120 Cong. Rec. 40,891 (1974) (statement of Rep. Hungate) (stating that Congress’s omission of specific privileges “cannot be interpreted as a congressional expression in favor of having no such privilege” or of annulling state privilege laws).
\item \textsuperscript{89} See 120 Cong. Rec. 40,891 (statement of Rep. Hungate) (“Rule 501 is not intended to freeze the law of privilege as it now exists. The phrase ‘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,’ is intended to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.”); S. Rep. No. 93-1277, at 13, \textit{reprinted in} 1974 U.S.C.C.A.N. at 7059 (“[T]he recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.”).
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3. The Marital Privileges

Among the numerous types of common-law testimonial privileges approved by courts, the marital privileges have enjoyed a long history of acceptance. Federal courts recognize two types of spousal privileges: the adverse spousal testimony privilege and the marital communications privilege. This section discusses each in turn.

a. The Adverse Spousal Testimony Privilege

The adverse spousal testimony privilege allows a witness to refuse to testify against his or her spouse, regardless of the source of the witness’s knowledge. The privilege dates back to the seventeenth century, when courts followed the rule of spousal incompetency, which dictated that wives and husbands were “incompetent,” or unqualified, to testify against their spouses. At the time, courts still adhered to the common-law rule of coverture, or the legal fiction that upon marriage, a wife’s legal identity merged with that of her husband, rendering them one person in the eyes of the law. Courts prohibited parties to the action from testifying, so as one legal person who was a party to the action, neither husband nor wife could...
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The U.S. Supreme Court abrogated the rule of spousal incompetency in 1933, but preserved the adverse spousal testimony privilege to provide some protection of the defendant’s marriage.

The adverse spousal testimony privilege has three prerequisites. First, the privilege may be invoked only in criminal proceedings. Second, the couple must be lawfully married at the time of trial. In other words, the adverse spousal testimony privilege does not survive the end of the marriage. Finally, the party invoking the privilege may only block adverse testimony, or testimony that tends to incriminate the defendant spouse. Courts conflict on the issue of whether the privilege prevents testimony regarding events occurring prior to the couple’s marriage.

99. See Trammel, 445 U.S. at 43–44; see also Mullane, supra note 52, at 116. For a thorough history of the common-law doctrine of spousal incompetency and its evolution into the marital privileges, see Brown v. State, 753 A.2d 84, 88–96 (Md. 2000), and R. Michael Cassidy, Reconsidering Spousal Privileges After Crawford, 33 AM. J. CRIM. L. 339, 355–58 (2006). The reader should be aware that some state statutes misleadingly use the words “incompetent” or “not competent” to indicate the existence of a privilege. See, e.g., Md. CODE ANN., CTS. & JUD. PROC. § 9-105 (LexisNexis 2006); Brown, 753 A.2d at 96 (holding that the language of section 9-105 “does not render a spouse ‘incompetent’ in any manner, but simply provides a privilege”).

100. See Funk v. United States, 290 U.S. 371, 386–87 (1933).

101. See id. at 373 (making clear that the Court does not address the defendant’s wife’s ability to testify against the defendant).


103. See, e.g., Hawkins v. United States, 358 U.S. 74, 77 (1958) (“[T]he law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake.”); In re Martenson, 779 F.2d 461, 463 n.6 (8th Cir. 1985) (supporting its position with proposed Rule 505(a)); 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 505.04 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997 & Supp. 2009). But see Ryan v. Comm'r, 568 F.2d 531, 544 (7th Cir. 1977) (“We acknowledge that an argument can be made that no policy supports the distinction between allowing the privilege against adverse spousal testimony in criminal cases but not in civil cases.”).

104. See, e.g., United States v. Bad Wound, 203 F.3d 1072, 1075 (8th Cir. 2000) (requiring that the witness-spouse and the defendant be married “at the time of trial” to invoke the adverse spousal testimony privilege). Common-law marriages are considered “lawful” marriages only in jurisdictions that recognize common-law marriages as valid. See, e.g., United States v. Acker, 52 F.3d 509, 514–15 (4th Cir. 1995) (prohibiting the accused from asserting the privilege against a man with whom she had lived for twenty-five years when the state did not recognize common-law marriages); United States v. Snyder, 707 F.2d 139, 147 (5th Cir. 1983).

105. See, e.g., United States v. Termini, 267 F.2d 18, 20 (2d Cir. 1959) (stating that “it is well settled that the privilege ends with the dissolution of the marriage as by divorce” because the purpose of the privilege is to prevent divorce (citing Pereira v. United States, 347 U.S. 1, 6 (1954))).

106. See, e.g., Hawkins, 358 U.S. at 76–78; 1 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 505.1, at 565 (4th ed. 1996) (explaining that favorable testimony is not protected because it does not threaten the harmony of the marriage).

107. Compare United States v. Van Drunen, 501 F.2d 1393, 1397 (7th Cir. 1974) (finding that although the defendant and witness were married at the time of trial, the privilege did not apply because the testimony concerned events occurring prior to the marriage), with A.B. v. United States, 24 F. Supp. 2d 488, 492 (D. Md. 1998) (holding that the privilege may be invoked even to protect matters that occurred before the marriage).
The purpose of the privilege is to foster marital harmony, both for the benefit of the individual couple and for society as a whole. When the Supreme Court first recognized the adverse spousal testimony privilege in *Hawkins v. United States*, both the witness-spouse and the defendant-spouse had the right to invoke the privilege. The Supreme Court believed that a witness-spouse's testimony against his or her defendant spouse, regardless of whether the testimony was compelled or voluntary, would disrupt marital harmony, undermining the purpose of the privilege.

The Supreme Court later overruled part of *Hawkins* in *Trammel v. United States*, holding that only the witness-spouse held the adverse spousal testimony privilege. In *Trammel*, the defendant had been charged with importing heroin into the United States from Thailand and the Philippines and conspiring to distribute the drugs. Over Trammel's objection, the U.S. District Court for the District of Colorado had permitted Trammel's wife, a coconspirator, to testify against him pursuant to an immunity agreement with the government. The prosecutor's entire case against Trammel rested on his wife's testimony. A jury convicted Trammel, who appealed, arguing that under the adverse spousal testimony privilege as developed in *Hawkins v. United States*, he could prevent his wife from testifying against him. On appeal, the Supreme Court upheld his conviction, scaling back the adverse spousal testimony privilege in the process by allowing only the witness-spouse to hold the privilege.

The *Trammel* Court based its decision on three grounds. First, the Court read Rule 501, providing that courts may interpret common-law privileges "in the light of reason and experience," to mean that the Supreme Court could revise the privileges when necessary. To reach this conclusion, the Court analyzed Congress's rejection of the nine codified privileges in the Proposed Federal Rules of Evidence, including Representative William Hungate's statement during the congressional

108. See, e.g., *Trammel v. United States*, 445 U.S. 40, 44 (1980); *Hawkins*, 358 U.S. at 78 (opining that a spouse's adverse testimony would likely destroy his or her marriage with the defendant); *United States v. Allery*, 526 F.2d 1362, 1365 (8th Cir. 1975).
109. 358 U.S. 74.
110. See *id.* at 74–75, 77 (holding that a court could not compel a witness-spouse to testify against his or her spouse and that the voluntary testimony of a witness-spouse would not be admitted without the consent of the defendant-spouse).
111. See *id.* at 77–79; see also *Wolfle v. United States*, 291 U.S. 14 (1934); *Stein v. Bowman*, 38 U.S. (13 Pet.) 209, 221–22 (1839).
112. 445 U.S. 40.
113. *Id.* at 53.
114. *Id.* at 42.
115. *Id.* at 42–43.
116. *Id.*
117. *Id.* at 43.
118. *Id.* at 53.
119. *Id.* at 47–53.
120. FED. R. EVID. 501.
hearings that the purpose of Rule 501 was to ""provide the courts with the flexibility to develop rules of privilege on a case-by-case basis."" The Trammel Court concluded from the congressional record that Congress's desire in enacting Rule 501 was to leave the law of privilege open to change and evolution.122

Next, as part of its Rule 501 "reason and experience" analysis, the Court looked to state law to ascertain the states' views of the adverse spousal testimony privilege.124 The Court found that nine states vested the adverse spousal testimony privilege in the witness-spouse alone and that seventeen states had abolished the privilege altogether in criminal proceedings.125 The Court stated that the trends in state privilege law were especially relevant because marriage is traditionally a concern of state laws.126

Finally, the Court found insufficient public policy to support the adverse spousal testimony privilege, which was the broadest of all the common-law testimonial privileges, as well as one of the most criticized due to its origin in the rule of spousal incompetency.127 The Trammel Court argued that the "archaic notion[ ]" that a woman, as a type of chattel, did not merit a legal identity separate from her husband and could not decide for herself whether to testify against him, had "long since disappeared."128 The Court also theorized that a witness-spouse's decision to testify against his or her spouse reflected the fact that the couple's marriage was likely already damaged beyond repair.129 In that instance, the Court reasoned, the testimony could not serve its purpose of protecting the marital relationship, so there was little logic in allowing the defendant-spouse to invoke the privilege.130

122. Id. at 47 (quoting 120 Cong. Rec. 40,891 (1974) (statement of Rep. Hungate)).
124. Id. at 48–50.
125. Id. at 48 n.9. The Court found that, since Hawkins in 1958, seven states had stopped allowing a defendant-spouse to hold the adverse spousal testimony privilege. Id. at 49–50.
126. Id. at 49–50.
127. Id. at 50–53; see also 8 Wigmore, supra note 97, § 2228, at 221 (referring to the privilege as "the merest anachronism in legal theory and an indefensible obstruction to truth in practice"). Criticism of the adverse spousal testimony privilege continues unabated. See, e.g., 1 Kenneth S. Broun et al., McCormick on Evidence § 66 (John W. Strong ed., 5th ed. 1999) (criticizing the adverse spousal testimony privilege as "an archaic survival of a mystical religious dogma").
128. Trammel, 445 U.S. at 52.
129. Id.
130. Id. But see Gofman, supra note 98, at 855–60. Echoing the Court's prior reasoning in Hawkins, Gofman argued that Trammel's reasoning is misguided because a marriage is not necessarily beyond repair simply because one spouse is willing to testify against the other and because even a dis harmonious marriage deserves the protection of the privilege. Id.; see also Hawkins v. United States, 358 U.S. 74, 77–78 (1958) (stating that "not all marital flare-ups in which one spouse wants to hurt the other are permanent," but that a court's decision to allow a witness-spouse to incriminate the defendant-spouse would cause permanent damage).
b. The Marital Communications Privilege

The second type of marital privilege is the marital communications privilege.131 A spouse may invoke the marital communications privilege only to prevent the disclosure of information obtained from private communications between spouses.132 There are a few other differences between this privilege and the adverse testimony privilege. First, because the marital communications privilege bars a spouse’s testimony only if it pertains to a communication made by the party-spouse, it is narrower than the adverse spousal testimony privilege. The latter bars the admission of any adverse spousal testimony, even if the spouse’s knowledge did not result from a communication to him or her by the witness’s spouse.133 Second, unlike the adverse spousal testimony privilege, which is available only in criminal cases,134 the marital communications privilege applies in both criminal and civil proceedings.135

To invoke the privilege, three conditions must be met.136 First, the requested testimony must be in reference to “words or acts intended as communications to the other spouse.”137 Second, the spouse must have communicated the information during a valid marriage,138 although some courts refuse to allow the privilege if the couple has irreconcilably separated.139 Finally, the parties must have intended the communications to

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131. See, e.g., United States v. Darif, 446 F.3d 701, 705–07 (7th Cir. 2006). The privilege is also known as the confidential communications privilege, see, e.g., United States v. Knox, 124 F.3d 1360, 1365 (10th Cir. 1997), marital confidential communication privilege, see, e.g., United States v. Bad Wound, 203 F.3d 1072, 1075 (8th Cir. 2000), or confidential marital communications privilege, see, e.g., Trammel, 445 U.S. at 47.

132. See Trammel, 445 U.S. at 50–53.

133. Id. at 51.

134. See supra note 103 and accompanying text.

135. See United States v. 281 Syosset Woodbury Road, 71 F.3d 1067, 1072 (2d Cir. 1995); Smith v. United Salt Corp., No. 1:08CV00053, 2009 WL 2929343, at *7 (W.D. Va. Sept. 9, 2009) (citing SEC v. Lavin, 111 F.3d 921 (D.C. Cir. 1997); Ryan v. Comm'r, 568 F.2d 531, 544 (7th Cir. 1977); 3 WEINSTEIN & BERGER, supra note 103, §505.09; MUELLER & KIRKPATRICK, supra note 39, § 5.32.

136. See, e.g., United States v. Marashi, 913 F.2d 724, 729–30 (9th Cir. 1990); Connor, supra note 40, at 144–46.

137. Marashi, 913 F.2d at 729 (citations omitted); see, e.g., Pereira v. United States, 347 U.S. 1, 6 (1954) (asserting that the marital communications privilege generally extends only to utterances and not to acts); United States v. Lefkowitz, 618 F.2d 1313, 1318 (9th Cir. 1980) (holding that a spouse’s testimony that her estranged husband had submitted false records to the Internal Revenue Service, when based on personal observations, is not a “communication” for purposes of the marital communications privilege).

138. As with the adverse spousal testimony privilege, common-law marriages meet the valid marriage requirement only if the jurisdiction where the couple resides recognizes such marriages as valid. See Connor, supra note 40, at 144; see, e.g., United States v. Jarvison, 409 F.3d 1221, 1224–31 (10th Cir. 2005) (recognizing a valid marriage where a traditional Navajo marriage ceremony had occurred and the couple had cohabitated and presented themselves to society as husband and wife).

139. See United States v. Murphy, 65 F.3d 758, 761–62 (9th Cir. 1995) (denying the privilege to a couple that had been separated for seven years and had filed for divorce); United States v. Roberson, 859 F.2d 1376, 1381 (9th Cir. 1988) (instructing the district court to determine whether a separated couple had “contemplated reconciliation or had abandoned
be confidential.\textsuperscript{140} Marital communications are presumed to be confidential, but when a third party is witness to or likely to overhear a communication between spouses, the communication is no longer considered confidential.\textsuperscript{141}

Jurisdictions differ on the question of who holds the privilege.\textsuperscript{142} The federal common-law rule, followed by some states,\textsuperscript{143} permits either spouse to claim the privilege.\textsuperscript{144} In other states, only the spouse who made the communication holds the privilege.\textsuperscript{145}

Like the adverse spousal testimony privilege, the purpose of the marital communications privilege is to preserve marital harmony.\textsuperscript{146} The marital communications privilege is more specific, however, in that it encourages free communication between spouses and protects the privacy of marriages.\textsuperscript{147} The privilege recognizes a spouse’s right to rely on marital intimacy when communicating with his or her spouse.\textsuperscript{148} While the adverse spousal testimony privilege seeks in particular to protect the marriages of all hope” at the time of a communication); United States v. Byrd, 750 F.2d 585, 592–94 (7th Cir. 1984) (“[T]here is little societal interest in protecting the confidential relationship of permanently separated couples.”). But see In re Grand Jury Investigation of Hugle, 754 F.2d 863, 865 (9th Cir. 1985) (holding that the marital communications privilege is available to “a partner in an existing, albeit disharmonious, marriage”).

\textsuperscript{140} See Connor, supra note 40, at 145.

\textsuperscript{141} Pereira, 347 U.S. at 6 (stating that the presumption of confidentiality may be overcome by “the intention that the information conveyed be transmitted to a third person”); United States v. McCown, 711 F.2d 1441, 1452–53 (9th Cir. 1983) (finding that a defendant’s instruction to his wife to write a check to purchase a gun was not a confidential communication because there was no indication that the defendant intended to keep the request a secret from the couple’s roommates); Lejkowitz, 618 F.2d at 1318 (holding that “the presence of others destroys confidentiality and renders the privilege inapplicable”).

\textsuperscript{142} See Frost, supra note 102, at 10.

\textsuperscript{143} See supra notes 51, 87 and accompanying text (explaining the distinction between federal and state evidentiary common law).


\textsuperscript{145} See, e.g., KY. R. EVID. 504(b) (“An individual has a privilege to refuse to testify and to prevent another from testifying to any confidential communication made by the individual to his or her spouse during their marriage.”); N.M. R. EVID. 11-505(B) (“A person has a privilege in any proceeding to refuse to disclose and to prevent another from disclosing a confidential communication by the person to that person’s spouse while they were husband and wife.”); Ashford v. State, 807 A.2d 732, 766 (Md. Ct. Spec. App. 2002) (citations omitted).

\textsuperscript{146} See Wolfe v. United States, 291 U.S. 7, 14 (1934); Connor, supra note 40, at 142.

\textsuperscript{147} See Wolfe, 291 U.S. at 14 (“The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails.”); Connor, supra note 40, at 142–43.

\textsuperscript{148} See United States v. 281 Syosset Woodbury Road, 71 F.3d 1067, 1070 (2d Cir. 1995) (stating that the marital communications privilege seeks “to protect the intimacy of private marital communications” (quoting In re Grand Jury Subpoena United States, 755 F.2d 1022, 1027 (2d Cir. 1985), vacated on other grounds sub nom. United States v. Koecher, 475 U.S. 133 (1986))).
witness- and defendant-spouses at trial, the marital communications privilege is more concerned with the right of all married people to confide freely in their spouses. So that a spouse must never fear that an ex-spouse may share the spouse’s secrets in court upon the event of a divorce, the privilege may be invoked even after a marriage has dissolved. Perhaps because of the specificity of the marital communications privilege, it has generally enjoyed a much less controversial reputation than the adverse spousal testimony privilege.

4. Justifications for the Marital Privileges

Although the marital privileges themselves have evolved over the years, the reasoning behind their existence has been relatively stable. Parts I.A.2 and I.A.3 briefly highlighted the aims of the two marital privileges, but this section discusses additional policy considerations underlying the privileges, of which there are three main types. First, courts initially used the marital privileges to exclude testimony seen as unreliable. Second, courts employ a utilitarian balancing test popularized by John Wigmore, the logic of which applies to all privileges: a testimonial privilege should exist only if the benefit of the privilege outweighs the harm caused by the loss of evidence. The final justification, limited to marital privileges, is that the marital relationship is so unique and critical to society that it warrants special protection. The following sections discuss each in turn.

149. See Connor, supra note 40, at 142–43.
150. See United States v. Byrd, 750 F.2d 585, 590 (7th Cir. 1984) (explaining that the marital communications privilege “exists to insure that spouses generally, prior to any involvement in criminal activity or a trial, feel free to communicate their deepest feelings to each other without fear of eventual exposure in a court of law”).
151. See Pereira v. United States, 347 U.S. 1, 6 (1954) (citing 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2341(2) (3d ed. 1940); 58 AM. JuR. Witnesses § 379 (1948)); Aveson v. Kinnaird, 6 East 188, 192, 102 Eng. Rep. 1258, 1260 (K.B. 1805) (stating that the marital communications privilege should exist even after a divorce because “the confidence which subsisted between them at the time shall not be violated in consequence of any future separation”), cited with approval in Stein v. Bowman, 38 U.S. (13 Pet.) 209, 221 (1839).
152. See Ryan v. Comm’r, 568 F.2d 531, 544 n.6 (7th Cir. 1977) (stating that the marital communications privilege “has not been the target of the intense criticism which has been leveled against the privilege against adverse spousal testimony”); id. (comparing MCCORMICK, EVIDENCE § 66 (2d ed. 1972) (arguing that the adverse spousal testimony privilege is based on “mystical religious dogma”), with id. §§ 78–86, at 126–33 (recognizing the need for a qualified marital communications privilege)).
153. This three-part classification of rationales for privileges is drawn partially from an unauthored student note. See Note, Developments in the Law—Privileged Communications, 98 HARV. L. REV. 1450, 1471–500 (1985) [hereinafter Privileged Communications].
155. See 8 WIGMORE, supra note 97, § 2285, at 527; infra Part I.A.4.b.
156. See infra Part I.A.4.c.
a. The Prevention of Perjury

One early aim of the marital privileges was to exclude the testimony of unreliable witnesses.\textsuperscript{157} This policy originated from the early common-law doctrine of spousal incompetency, which evolved into the marital privileges, as discussed above.\textsuperscript{158} Although the basis for the rule of spousal incompetency was the legal fiction of coverture,\textsuperscript{159} the underlying purpose in rejecting both spouses’ testimony was to prevent the potentially untruthful testimony of an “interested” witness who was invested in the outcome of the proceedings.\textsuperscript{160} Even after courts had rejected the idea of coverture, they continued to hold spouses incompetent to testify because their testimony could be unreliable.\textsuperscript{161}

The policy of barring a spouse’s testimony to avoid unreliable witnesses has since fallen out of favor.\textsuperscript{162} Courts have rejected this reasoning on the grounds that cross-examination guards against perjury and modern juries can accurately judge a witness’s credibility.\textsuperscript{163} The Supreme Court has also reasoned that to allow a defendant to testify but prohibit his wife from doing so is illogical because a defendant possesses an equal, if not greater, motivation to lie on the stand.\textsuperscript{164}

b. Wigmore’s Four-Factor Balancing Test

When determining whether a privilege protecting communications should be available,\textsuperscript{165} courts and scholars frequently cite John Wigmore,\textsuperscript{166} who

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\item[157.] See Clements v. Marston, 52 N.H. 31, 37 (1872) (stating that one reason for the common-law doctrine of spousal incompetency was to deter spouses who might be tempted to lie under oath to protect his or her spouse); supra note 91 and accompanying text.
\item[158.] See Trammel v. United States, 445 U.S. 40, 43–44 (1980). But see Mullane, supra note 52, at 122–30 (arguing that the rule of spousal incompetency did not evolve into the adverse spousal testimony privilege and that the two are completely distinct).
\item[159.] See supra note 98 and accompanying text.
\item[161.] See Clements, 52 N.H. at 37 (stating that the adverse spousal testimony privilege serves the public good because it prevents witness-spouses from committing perjury to protect their spouses); see also Mullane, supra note 52, at 126 (suggesting that a spouse in a disintegrating marriage would be more likely to lie while testifying to hurt his or her spouse).
\item[162.] See, e.g., Funk v. United States, 290 U.S. 371, 381–82 (1933).
\item[163.] In eliminating the rule, the Supreme Court explained that the danger of an interested witness telling convincing lies on the stand was virtually nonexistent due to jurors’ ability to judge a witness’s credibility and judicial procedures like cross-examination. Id. at 380.
\item[164.] Id. at 381.
\item[165.] Because this theory justifies privileges protecting private conversations, this theory is applicable only to the marital communications privilege. See supra notes 96, 106 and accompanying text.
\item[166.] See 8 WIGMORE, supra note 97, § 2285, at 527–28; see, e.g., Jaffee v. Redmond, 518 U.S. 1, 10–15 (1996) (adopting a four-factor test similar to Wigmore’s in deciding to recognize a psychotherapist-patient privilege); ACLU v. Finch, 638 F.2d 1336, 1344 (5th Cir. 1981) (describing Wigmore’s “classic utilitarian formulation” as the standard to use when weighing the value of a new privilege); Garner v. Wolfinbarger, 430 F.2d 1093, 1100–04 (5th Cir. 1970) (utilizing Wigmore’s four conditions to determine the availability of the attorney-client privilege); Catherine B. Sarson, Note, The Child-Parent Testimonial
found the following four conditions necessary before courts should grant a privilege:

(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; and

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.  

Wigmore based these conditions on the premise that the main purpose of privileges is to encourage open communication, which is necessary for the formation and maintenance of socially beneficial relationships.  

The test, however, ensures that courts strike the proper balance between admitting and excluding testimony by instructing courts to recognize a privilege only if the resulting social benefits outweigh the harm that results when useful evidence is excluded from legal proceedings.  

Part I.B discusses this balancing test in detail.

c. The Preservation of Marriage Theory

The last of the three justifications for the privileges focuses on the uniqueness of the marital relationship, which merits special protection. Proponents of this theory argue that the marital privileges preserve domestic harmony because, if one spouse were forced to testify against the other, the marriage would be harmed beyond repair. Even though the absence of a privilege would ensure that all relevant evidence is admissible, the legal system places more value in the preservation of the institution of marriage.

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Privilege: Attempts at Codification Have Missed Their Mark, 12 GEO. J. LEGAL ETHICS 861, 864–65 (1999) (finding that the marital communications privilege fulfills all four of Wigmore’s conditions).

167. 8 WIGMORE, supra note 97, § 2285, at 527.

168. See Frost, supra note 102, at 15–16 (citing 8 WIGMORE, supra note 97, § 2285, at 527).

169. See id.

170. See, e.g., Trammel v. United States, 445 U.S. 40, 44 (1980); In re Malfitano, 633 F.2d 276, 277–78 (3d Cir. 1980); United States v. Tsinnijinnie, 601 F.2d 1035, 1038 (9th Cir. 1979); Ryan v. Comm'r, 568 F.2d 531, 543–45 (7th Cir. 1977); see also Sarson, supra note 166, at 863 (asserting that “open and honest communication between husband and wife, without imposing fear of compulsory disclosure of marital secrets,” is valuable to society).

171. See Trammel, 445 U.S. at 44; Malfitano, 633 F.2d at 277–78; Ryan, 568 F.2d at 543 (citing the fear that forced spousal testimony destroys marriages); Clements v. Marston, 52 N.H. 31, 36 (1872) (explaining the view that “it was not expedient to place husband and wife in a position that might lead to dissensions and strife between them”); Frost, supra note 102, at 21–22.
marriage, which the Supreme Court has called "the best solace of human existence."\textsuperscript{172}

In a related argument, one scholar has classified this rationale as essentially humanistic, suggesting it is "fundamentally indecent" for courts to intrude upon the privacy of a couple's marriage.\textsuperscript{173} Similarly, some believe it is morally wrong and even cruel to compel a spouse to testify adversely because it forces the witness-spouse to be instrumental in the demise of his or her spouse.\textsuperscript{174}

Related to the preservation of marriage theory is the public policy focusing on the value our society places in personal privacy.\textsuperscript{175} This theory maintains that insulating marriages from public scrutiny allows for personal autonomy, permits emotional release, encourages self-evaluation, and fosters the personal development of all citizens.\textsuperscript{176}

B. The Child Abuse Exception in the Federal Courts

Despite the fact that marital privileges have been a constant feature of U.S. common law, courts have developed two exceptions to the privileges when the importance in admitting a witness-spouse's testimony outweighs the justifications detailed above.\textsuperscript{177} The first exception eliminates the marital privileges when the testimony relates to a crime committed by both spouses.\textsuperscript{178} The second exception, and the subject of this Note, eliminates the privileges when the witness-spouse's testimony relates to a crime committed against the witness-spouse or his or her child.\textsuperscript{179} This section outlines the two exceptions, analyzing the second in detail.

1. Exceptions to the Marital Privileges

Because privileges obstruct the justice system's search for truth, courts have construed them particularly narrowly in criminal proceedings, where society has a "strong interest in the administration of justice."\textsuperscript{180} One way

\textsuperscript{172} Stein v. Bowman, 38 U.S. (13 Pet.) 209, 223 (1839).
\textsuperscript{173} Cassidy, supra note 99, at 360 (citing RICHARD M. GULA, ETHICS IN PASTORAL MINISTRY 120–21 (1996); Charles L. Black, Jr., The Marital and Physician Privileges—A Reprint of a Letter to a Congressman, 1975 DUKE L.J. 45).
\textsuperscript{174} See 3 WEINSTEIN & BERGER, supra note 103, § 505.03 (stating that traditionally there has been "a sense that civilized society should not compel a husband or wife to be the means of the other spouse's conviction"); Cassidy, supra note 99, at 360–61 (citing Preliminary Draft, supra note 59, at 264).
\textsuperscript{176} See ALAN F. WESTIN, PRIVACY AND FREEDOM 32–37 (1967).
\textsuperscript{177} See supra Part I.A.3.
\textsuperscript{178} See infra note 185 and accompanying text.
\textsuperscript{179} See infra notes 185–214 and accompanying text.
\textsuperscript{180} United States v. Marashi, 913 F.2d 724, 730 (9th Cir. 1990) (citing United States v. Roberson, 859 F.2d 1376, 1380 (9th Cir. 1988)).
that courts construe privileges narrowly is by carving out exceptions to the privileges when competing public policies prove more compelling than those behind a privilege.\textsuperscript{181} In the case of marital privileges, therefore, courts have created exceptions when the need to ensure that justice is served outweighs the public policy underlying the privileges.\textsuperscript{182}

This balancing test has led to two commonly accepted exceptions to the marital privileges in federal courts.\textsuperscript{183} First, the marital communications privilege—and, in some circuits, the adverse spousal testimony privilege—\textsuperscript{184}—does not apply during prosecutions of crimes in which both spouses are participants.\textsuperscript{185} The second exception, and the subject of this Note, applies in criminal proceedings in which a defendant is charged with the abuse of his or her spouse\textsuperscript{186} or child.\textsuperscript{187} The next section discusses this exception in detail.

2. The Development of the Child Abuse Exception

The child abuse exception originates from a common-law exception to the doctrine of spousal incompetency dictating that courts admit a witness-

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\item See Connor, supra note 40, at 146–47; see, e.g., Jaffee v. Redmond, 518 U.S. 1, 8–9 (1996) (emphasizing that Rule 501 not only allows but directs courts to modify privileges when necessary).\textsuperscript{181}
\item See, e.g., State v. Pelletier, 818 A.2d 292 (N.H. 2003). In State v. Pelletier, the New Hampshire Supreme Court held that "[t]he marital privilege may, for reasons of public policy, be appropriately limited. . . . [W]e will not cloak the sexual activity between a husband and wife with the marital privilege when, as here, disclosure would provide relevant information concerning the alleged sexual abuse of a child of one of the spouses who is living with them." Id. at 298 (citing N.H. REV. STAT. ANN. § 161-F:48 (2003)).\textsuperscript{182}
\item See, e.g., United States v. Banks, 556 F.3d 967, 974 (9th Cir. 2009); United States v. Allery, 526 F.2d 1362, 1365 (8th Cir. 1975).\textsuperscript{183}
\item Compare United States v. Clark, 712 F.2d 299, 302 (7th Cir. 1983) ("[T]he public interest in discouraging a criminal from enlisting the aid of his or her spouse as an accomplice outweighs the interest in protecting the marriage."); with In re Grand Jury Subpoena United States, 755 F.2d 1022, 1025–28 (2d Cir. 1985) (rejecting the joint participants exception to the adverse spousal testimony privilege), and In re Malfitano, 633 F.2d 276, 278–80 (3d Cir. 1980).\textsuperscript{184}
\item See United States v. Darif, 446 F.3d 701, 705–07 (7th Cir. 2006); Marashi, 913 F.2d at 730 (stating that every circuit addressing the issue has created the joint participants exception to the marital communications privilege). See generally Amy G. Bermingham, Partners in Crime: The Joint Participants Exception to the Privilege Against Adverse Spousal Testimony, 53 FORDHAM L. REV. 1019 (1985). The Second Circuit has explained the policy behind this exception as follows:

The [circuit]s which recognize that 'partnership in crime' exception to the confidential communication privilege believe that greater public good will result from permitting the spouse of an accused to testify willingly concerning their joint criminal activities than would come from permitting the accused to erect a roadblock against the search for truth.

United States v. Estes, 793 F.2d 465, 468 (2d Cir. 1986).\textsuperscript{185}

\item See Trammel v. United States, 445 U.S. 40, 46 n.7 (1980); Wyatt v. United States, 362 U.S. 525, 526–27 (1960).\textsuperscript{186}
\item See, e.g., United States v. Bahe, 128 F.3d 1440 (10th Cir. 1997); United States v. White, 974 F.2d 1135 (9th Cir. 1992); United States v. Allery, 526 F.2d 1362 (8th Cir. 1975); United States v. Martinez, 44 F. Supp. 2d 835 (W.D. Tex. 1999); infra notes 312–33 and accompanying text. This Note refers to this exception as the child abuse exception.\textsuperscript{187}
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spouse’s testimony in trials for a defendant’s abuse of the witness-spouse.\textsuperscript{188} For clarity, this Note refers to this exception as the spousal abuse exception. After the rule of spousal incompetency was abrogated in federal courts in 1933,\textsuperscript{189} the Supreme Court continued to apply the spousal abuse exception to the adverse spousal testimony privilege.\textsuperscript{190} Federal courts did not address the question of whether the spousal abuse exception also applied in cases of a defendant’s abuse of his or her child or stepchild, however, until 1975 in \textit{United States v. Allery}.\textsuperscript{191} The defendant, Fred Allery, appealed his conviction for the attempted rape of his twelve-year-old daughter.\textsuperscript{192} His main argument on appeal was that the trial court’s admission of his wife’s testimony against him violated the adverse spousal testimony privilege.\textsuperscript{193} Allery’s wife testified at trial as to his actions on the evening of the attempted rape and previous alleged sexual misconduct with the prosecutrix and other minor female children in their family.\textsuperscript{194}

At the time of Allery’s appeal, federal courts recognized the “well-established” spousal abuse exception to the adverse spousal testimony privilege, which allowed a witness-spouse’s testimony when the defendant had committed an offense against the witness-spouse.\textsuperscript{195} In \textit{Allery}, the U.S. Court of Appeals for the Eighth Circuit expanded that exception to include “crimes done to a child of either spouse.”\textsuperscript{196} The \textit{Allery} court considered the policy behind the privilege in its decision and listed five reasons for expanding the exception.\textsuperscript{197}

First, the court reasoned that a serious crime against a couple’s child is an offense against both family harmony, which the privilege purportedly protects, and society.\textsuperscript{198} To uphold the privilege in such cases, therefore, would undermine the privilege’s purpose.\textsuperscript{199} Second, the court noted that parental testimony is necessary in many prosecutions for child abuse because child abuse is usually an intrahousehold crime.\textsuperscript{200} The \textit{Allery} court cited a statistic estimating that over 90% of reported child abuse occurred in

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\item[188.] See Stein v. Bowman, 38 U.S. (13 Pet.) 209, 209 (1839) (citations omitted) (stating that, although husbands and wives generally may not be witnesses for or against the other, that rule does not apply when the husband commits a crime against his wife). This exception can be traced back even further in English common law. See Lord Audley’s Case, Hut. 115, 116, 123 Eng. Rep. 1140, 1141 (C.P. 1631), cited with approval in Trammel v. United States, 445 U.S. at 46 n.7.
\item[189.] See Funk v. United States, 290 U.S. 371 (1933).
\item[190.] See, e.g., Wyatt v. United States, 362 U.S. 525, 526–27 (1960) (approving the rule followed, at that time, in five circuits).
\item[191.] 526 F.2d 1362.
\item[192.] Id. at 1363.
\item[193.] Id. at 1364.
\item[194.] Id. at 1363.
\item[195.] Id. at 1365.
\item[196.] Id. at 1367.
\item[197.] Id. at 1366–67.
\item[198.] Id. at 1366.
\item[199.] See id.
\item[200.] Id.
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the home, and in 87.1% of those cases, a parent or parent substitute was the perpetrator. In such intrahousehold abuse cases, the defendant’s spouse is likely to be the only adult witness with knowledge of the crime, so his or her testimony is essential to the prosecution. The third justification cited by the Allery court for expanding the exception is that any “rule that impedes the discovery of truth in a court of law impedes as well the doing of justice.” Fourth, in its Rule 501 reason and experience analysis, the court took into account the many state jurisdictions recognizing a child abuse exception. Finally, in the same vein as the previous justification, the court found that in the prior fifteen years, at least eleven states had codified child abuse exceptions.

The Supreme Court later signaled its approval of Allery’s constraint on the marital privileges in cases of child abuse, and other circuits have continued to rely on Allery in their appraisals of the appropriate scope of marital privileges.

3. Current Forms of the Child Abuse Exception

Because the Rules do not govern state court decisions, states establish their own evidentiary rules, including those regarding privileges. Among the fifty-one jurisdictions with child abuse exceptions, five basic forms of the exception have emerged: (1) crimes against any child, regardless of his or her relationship to the defendant; (2) crimes against a spouse, a


202. See Allery, 526 F.2d at 1366; see also 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, 169 (2007) (stating that there is “an immense need to admit all possible evidence in child abuse cases” because typically there are few witnesses to the abuse).

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

204. Id. at 1366–67 (citing Balltrip v. People, 401 P.2d 259 (Colo. 1965); People v. Miller, 168 N.W.2d 408 (Mich. 1969); State v. Kollenborn, 304 S.W.2d 855 (Mo. 1957); Chamberlain v. State, 348 P.2d 280 (Wyo. 1960)).

205. Id. at 1367 (citations omitted) (citing eleven state statutes).

206. See Trammel v. United States, 445 U.S. 40, 46 n.7 (1980) (citing Allery, 526 F.2d at 1362; WIGMORE, supra note 97, § 2338) (stating that Allery’s exception to the adverse spousal testimony privilege has been found to apply to the marital communications privilege as well).

207. See infra notes 312–33 and accompanying text.

208. See FED. R. EVID. 101.

209. All fifty states and Washington, D.C., have child abuse exceptions. See infra notes 210–14.

210. See, e.g., COLO. REV. STAT. ANN. § 18-3-411(5) (West 2008) (holding that a spouse may not invoke either marital privilege in any prosecution for a sex offense against a child); CONN. GEN. STAT. ANN. § 46b-129a(3) (West 2009) (eliminating the marital communications privilege in all child abuse cases); GA. CODE ANN. § 24-9-23 (West 1995) (stating that neither marital privilege applies in cases of crimes against any minor child); IDAHO R. EVID.
child of either spouse, or persons residing in the home;\(^\text{211}\) (3) crimes against a child of either spouse or a child in the care, custody, or control of either

504(d)(1) (eliminating the privileges in all child abuse cases); IND. CODE ANN. § 31-32-11-1 (LexisNexis Supp. 2007) (abrogating the marital communications privilege "in any judicial proceeding resulting from a report of a child who may be a victim of child abuse or neglect"); LA. REV. STAT. ANN. § 14:403(B) (2007) (stating that "[i]n 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"); MD. CODE ANN., CTS. & JUD. PROC. § 9-106(a)(1) (LexisNexis 2006) (eliminating the adverse spousal testimony privilege—but not the marital communications privilege—when the charges involve "[t]he abuse of a child under 18"); MICH. COMP. LAWS ANN. § 600.2162(3)(c) (West Supp. 2009) (eliminating only the adverse spousal testimony privilege in "a prosecution for a crime committed against a child of either or both or a crime committed against an individual who is younger than 18 years of age"); MISS. CODE ANN. § 13-1-5 (West 1999) (providing that the adverse spousal testimony privilege is inapplicable in a prosecution "for a criminal act against any child"); MISS. R. EVID. 504(d)(1) (eliminating the marital communications privilege when the defendant has committed a crime against "the person of any minor child"); MO. ANN. STAT. § 546.260 (West 2009) (stating that neither the adverse spousal testimony privilege nor the marital communications privilege may be invoked "in any criminal prosecution . . . involving an alleged victim under the age of eighteen"); N.H. REV. STAT. ANN. § 169-C:32 (LexisNexis 2001) (providing that the marital privileges do not apply in cases of child abuse); S.C. CODE ANN. § 19-11-30 (Supp. 2009) (establishing an exception to the marital communications privilege in cases of "child abuse or neglect, the death of a child, criminal sexual conduct involving a minor, or the commission or attempt to commit a lewd act upon a minor"); TEX. R. EVID. 504 (barring invocation of the marital communications privilege and adverse spousal testimony privilege in proceedings where the spouse is accused of a crime against "the spouse, any minor child, or any member of the household of either spouse"); VA. CODE ANN. § 19.2-271.2 (2008) (eliminating the adverse spousal testimony and marital communications privileges in prosecutions for physical or sexual abuse of a minor); WYO. STAT. ANN. § 14-3-210 (2009) (eliminating the marital communications privilege—but not the adverse spousal testimony privilege—in all child abuse cases); State v. Anderson, 636 N.W.2d 26, 33–34 (Iowa 2001) (explaining that Iowa Code sections 232.69(2) and 232.74 prevent the application of the marital communications privileges in cases related to reports of suspected child abuse by a "person responsible for the care of the child"); Villalta v. Commonwealth, 702 N.E.2d 1148, 1152 (Mass. 1998) (interpreting MASS. GEN. LAWS ch. 233, § 20 (1996) as eliminating both marital privileges in proceedings involving the abuse of any child). \(^{\text{But see State v. Taylor, 642 So. 2d 160, 165–66 (La. 1994) (explaining that Louisiana has not adopted any exceptions to the adverse spousal testimony privilege because the privilege may not be exercised by the defendant).}}\)

211. See, e.g., ALA. R. EVID. 504(d)(3) and advisory committee’s note (stating that the word “child” is not limited to a natural child of the spouses for purposes of the exception to the marital communications privilege); ARK. CODE ANN. § 16-41-101 (1999) (adopting this exception to the marital communications privilege); DEL. R. EVID. 504(d); HAW. R. EVID. 505(c)(1) (eliminating both privileges in these instances); KY. R. EVID. 504 (applying the exception to both privileges and providing that "[t]he court may refuse to allow the privilege in any proceeding if the interests of the minor child of either spouse may be adversely affected"); ME. R. EVID. 504(d); N.D. R. EVID. 504(d); OKLA. STAT. ANN. tit. 12, § 2504(D) (West 2007); S.D. CODIFIED LAWS § 19-13-15 (1995) (establishing this exception for the marital communications privilege); UTAH R. EVID. 502(b)(4)(C)(ii) (creating this exception for the marital communications privilege); VT. R. EVID. 504(d); Munson v. State, 959 S.W.2d 391, 392–93 (Ark. 1998) (holding that a fourteen-year-old child who was visiting the defendant’s home when he sexually assaulted her “resided” in the home, triggering the child abuse exception as codified in ARK. R. EVID. 504(d)(3)).

Uniform Rule of Evidence 504(d) is the basis for this form of the child abuse exception. See UNIF. R. EVID. 504(d), 13C U.L.A. 427–29 (2004). The proposed Federal Rules of Evidence were the basis for the 1974 revision of the Uniform Rules of Evidence, which a number of states subsequently adopted. See MUeller & Kirkpatrick, supra note
(4) crimes against the witness-spouse or either spouse’s child or relative; and (5) crimes against a spouse or a child of either spouse.


212. See, e.g., 725 ILL. COMP. STAT. ANN. 5/115-16 (West 2008) (establishing that a spouse may testify to confidential communications in cases where a spouse is “charged with an offense against the person or property of the other . . . when the interests of their child or children or of any child or children in either spouse’s care, custody, or control are directly involved”); MINN. STAT. ANN. § 595.02(1)(a) (West 2000) (establishing that there is no confidential communication privilege in a “criminal action or proceeding for a crime committed by one against the other or against a child under the care of either spouse”); NEV. REV. STAT. ANN. § 49.295(2)(e)(1) (LexisNexis 2006) (holding there are no marital privileges in a criminal proceeding in which one spouse is charged with a “crime against the person or the property of the other spouse or of a child of either, or of a child in the custody or control of either, whether the crime was committed before or during marriage”); N.J. R. EVID. 501, 509 (eliminating both marital privileges in cases where the crime is “against the spouse, a child of the accused or of the spouse, or a child to whom the accused or the spouse stands in the place of a parent”); N.Y. FAM. CT. ACT § 1046(a)(vii) (McKinney 2007) (eliminating the confidential communications in proceedings for child abuse or neglect); N.C. GEN. STAT. § 8-57(b)(5)-(c) (2007) (specifying that there shall be no adverse spousal testimony privilege “in a prosecution of one spouse for any other criminal offense against the minor child of either spouse, including any illegitimate or adopted or foster child of either spouse,” but that the marital communications privilege remains intact); 42 PA. CONS. STAT. ANN. § 5913(2) (West 2000) (establishing that there is no adverse spousal testimony privilege “in any criminal proceeding against either [spouse] for bodily injury or violence attempted, done or threatened upon the other, or upon the minor children of said husband and wife, or the minor children of either of them, or any minor child in their care or custody, or in the care or custody of either of them”); TENN. CODE ANN. § 24-1-201 (2000) (stating that the marital communications privilege “shall not apply to proceedings . . . concerning abuse of . . . a minor in the custody of or under the dominion and control of either spouse”); WASH. REV. CODE ANN. § 5.60.060(1) (West 2009) (eliminating both privileges in proceedings related to a defendant’s abuse of “any child of whom said spouse or domestic partner is the parent or guardian”); Commonwealth v. Spetzer, 813 A.2d 707, 720 (Pa. 2002) (interpreting 42 PA. CONS. STAT. ANN. § 5914 to mean that communications from one spouse to another about child abuse will not be considered confidential).

213. CAL. EVID. CODE § 972(e)(1) (West 2009) (eliminating the adverse spousal testimony privilege when the defendant-spouse is charged with a crime against the witness-spouse or “a child, parent, relative, or cohabitant of either”); W. VA. CODE ANN. § 57-3-3 (LexisNexis 2005) (creating an exception to the adverse spousal testimony privilege “in the case of a prosecution for an offense committed by one against the other, or against the child, father, mother, sister or brother of either of them”).

214. See, e.g., ALASKA R. EVID. 505(a)(2)(D)(i), (b)(2)(A) (establishing the exception for both the adverse spousal testimony privilege and the marital communications privilege); CAL. EVID. CODE § 985(a) (West 2009) (codifying the exception to the marital communications privilege); FLA. STAT. ANN. § 90.504(3)(b) (West 1999) (establishing that there is no husband-wife privilege when a spouse is charged with a crime against the other spouse or a child of either); KAN. STAT. ANN. § 60-428(b)(3) (1994) (establishing exceptions to the marital communications privilege “in a criminal action in which one of them is charged with a crime against the person or property of the other or of a child of either”); MONT. CODE ANN. § 26-1-802 (2009) (“The privilege does not apply to a civil action or proceeding by one spouse against the other or to a criminal action or proceeding for a crime committed by one spouse against the other or against a child of either spouse.”); NEB. REV. STAT. § 27-505(3)(a) (2008) (creating an exception to the marital communications privilege when a crime is committed against a “child of either”); N.M. R. EVID. 11-505(D) (holding that there is no marital privilege “in proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either”); N.C. GEN. STAT. § 8-57(b)(5) (2007) (ordering that a spouse may be compelled to testify in “a prosecution of one
Although these forms of the exception overlap, each is conceptually distinct. Part II of this Note discusses in detail the various forms of the child abuse exception adopted in federal courts.

II. THE CIRCUIT SPLIT: THE INCONSISTENT ADOPTION AND APPLICATION OF CHILD ABUSE EXCEPTIONS IN FEDERAL COURTS

Like the states, federal courts differ in their treatment of the child abuse exception to the marital privileges. This part uses the 2009 case *United States v. Banks*215 to revisit the various forms of the child abuse exception. This section first describes the *Banks* decision in detail, then reviews the child abuse exceptions adopted in other circuits and in military courts, providing scholarly support for the forms of the child abuse exception adopted by the courts.

A. Forms of the Child Abuse Exception Limited to Victims Related to the Defendant

1. The Most Recent Treatment of the Child Abuse Exception in Federal Courts: The Ninth Circuit’s Narrow Child Abuse Exception

The recent Ninth Circuit decision *United States v. Banks* illustrates the struggle federal courts have faced in attempting to strike the proper balance between the public policy behind the well-established (yet heavily criticized)216 marital privileges and the importance of prosecuting child abusers in the most effective way possible.

The FBI launched an investigation into Jerry Levis Banks’s activity in an Internet chat room called “Kid Sex and Incest” after a Canadian child pornographer, cooperating with the Canadian government, told authorities of Banks’s illegal activity.217 The FBI’s execution of a search warrant at Banks’s house led to the discovery of evidence of child pornography and

spouse for any other criminal offense against the minor child of either spouse, including any illegitimate or adopted or foster child of either spouse”); *Ohio Rev. Code Ann.* § 2945.42 (LexisNexis 2006) (codifying an exception to the marital communications privilege in the case of an offense against the spouse for cruelty to their children); *Or. Rev. Stat. Ann.* § 40.255(4)(a) (West 2003) (denoting that there is no marital privilege in criminal actions when a spouse is charged with an “offense or attempted offense against the person or property of the other spouse or of a child of either”); *R.I. Gen. Laws* § 12-17-10.1 (2002) (stating that a spouse may be ordered to testify against his or her spouse in cases of abuse against the spouse or a child of either); *Wis. Stat. Ann.* § 905.05(3)(b) (West 2000) (eliminating the marital communications privilege when a spouse is charged “with a crime against the person or property of the other or of a child of either”); *Johnson v. United States*, 616 A.2d 1216, 1224 (D.C. 1992) (interpreting D.C. *Code Ann.* § 14-306(b) (LexisNexis 1991)). But see N.C. *Gen. Stat.* § 8-57(c) (2007) (stating that there are no exceptions to the marital communications privilege).

216. See infra Part II.B.2.
the seizure of Banks’s computer equipment.\textsuperscript{218} As a result, the FBI arrested Banks and the government charged him with nine counts of possessing, producing, transporting, and receiving child pornography.\textsuperscript{219}

Seven of the counts proceeded to trial in the District of Idaho, where Judge William B. Shubb of the Eastern District of California\textsuperscript{220} held a bench trial.\textsuperscript{221} At trial, the primary issue was whether Banks had created a video sent to the Canadian child pornographer.\textsuperscript{222} The video depicted a young child having his diaper changed,\textsuperscript{223} but only the hands and arms of the person changing the diaper were visible.\textsuperscript{224} To identify Banks and his grandchild as the individuals in the video, the government called Banks’s wife, Kathryn Banks, as a witness.\textsuperscript{225} Kathryn testified that the child depicted was her grandson and identified her husband’s ring, watch, and couch in the video.\textsuperscript{226}

The prosecutor then asked her whether her husband had said anything to her about a video involving their grandson.\textsuperscript{227} Banks objected, arguing that such information was protected by the marital communications privilege.\textsuperscript{228}

Up until that point, \textit{United States v. White}\textsuperscript{229} was the controlling precedent regarding exceptions to the marital communications privilege in the Ninth Circuit.\textsuperscript{230} In \textit{White}, the U.S. District Court for the Northern District of California convicted defendant Joseph Lamont White of

\begin{verbatim}
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\begin{enumerate}
\item Banks, 2006 U.S. Dist. LEXIS 82368, at *3.
\item See Banks, 556 F.3d at 971; see also 18 U.S.C. § 2252 (2006) (prohibiting child pornography).
\item Judge William B. Shubb was sitting in the District of Idaho. DOJ Press Release, supra note 4.
\item See Banks, 556 F.3d at 971; Waiver of Trial by Jury and Waiver of Special Findings of Facts, supra note 13, at 1.
\item Banks, 556 F.3d at 971.
\item Id. at 979. The U.S. Court of Appeals for the Ninth Circuit described the contents of the videos as follows:

Using a diaper wipe, Banks touched, rubbed and held the child’s penis. Banks also massaged the child’s scrotum and anus, and the time spent wiping the child’s anus appears prolonged. These actions were taken at a point in the diaper-changing where it could reasonably be concluded that they were extraneous. Indeed, after the cleaning process appeared complete, Banks exited the screen and returned two more times with new wipes and continued touching the child. In addition, messages between Banks and the Canadian pedophile demonstrated that Banks represented the video as depicting the child’s erection.

\textit{Id.}

\item See Appellant’s Reply Brief at 16, Banks, 556 F.3d 967 (9th Cir. 2009) (No. 07-30130), 2008 WL 937157, at *16.
\item Id. at 17; see also Banks, 556 F.3d at 971.
\item Banks, 556 F.3d at 971.
\item \textit{Id.}
\item Id. at 971, 974. Because only the witness-spouse holds the adverse spousal testimony privilege, see supra note 118 and accompanying text, and Kathryn Banks testified voluntarily, choosing not to invoke the privilege, Jerry Banks was only able to invoke the marital communications privilege, held by both spouses. See supra note 144 and accompanying text.
\item 974 F.2d 1135 (9th Cir. 1992).
\item See Banks, 556 F.3d at 974.
\end{enumerate}
\end{footnotesize}
\end{verbatim}
involuntary manslaughter after his two-year-old stepdaughter, Jasmine, died from severe head injuries she incurred while in White’s care. Over White’s objection, the district court allowed his wife, Jayne, to testify at trial that during a fight regarding White’s role as caretaker of Jayne’s children, White told Jayne that if she left Jasmine in his care again, he would kill both Jayne and Jasmine. The district court held that the marital communications privilege invoked by White was unavailable. On appeal, relying on United States v. Allery and United States v. Marashi, the Ninth Circuit held that a defendant’s threats against the witness-spouse and her child do not further the purpose of the marital communications privilege, so the district court properly rejected White’s invocation of the privilege. In so holding, the White court established a child abuse exception that eliminated the marital communications privilege when the statements at issue related to the abuse of a spouse or a spouse’s child.

The Banks district court, following White, also used the Allery balancing test to weigh the public policy behind the privilege—strengthening marriages—against the policy behind the exception—effectively prosecuting defendants who abuse their children. The district court reasoned that although the child abuse exception created in White only protected a witness-spouse and the witness-spouse’s children, public policy mandated that the exception also apply when the minor victim shared the equivalent of a parent-child relationship with the defendant or witness-spouse. Based on the facts of the case, the district court concluded that the Bankses’ relationship with their grandchild was equivalent to a parent-child relationship and prohibited Banks from invoking the marital communications privilege to prevent his wife’s testimony.

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231. White, 974 F.2d at 1137.
232. Id.
233. Id.
234. United States v. Allery, 526 F.2d 1362 (8th Cir. 1975), held that the adverse spousal testimony privilege should not apply when public policy supporting the admission of the testimony is deemed more important than the policy of protecting the spouses’ marriage. See id. at 1366–67; supra notes 191–207 and accompanying text (discussing Allery’s reasoning). In relying on Allery, the White court followed the Supreme Court’s suggestion in Trammel that Allery’s reasoning could support an exception to the marital communications privilege as well as the adverse spousal testimony privilege. See Trammel v. United States, 445 U.S. 40, 46 n.7 (1980); White, 974 F.2d at 1138.
235. 913 F.2d 724, 731 (9th Cir. 1990) (holding that the marital communications privilege does not apply to a spouse’s statements furthering joint criminal activity because the public policy of effectively prosecuting criminals outweighs the policies underlying the privilege).
236. White, 974 F.2d at 1138.
237. Id.
239. Id. at 974 (majority opinion).
240. Id. at 975–76.
After the district court overruled Banks's objection, Kathryn Banks testified that her husband had told her that he made the video, explaining that he had done so to assure her that "nothing went on in changing the diaper because of past things." "Past things" referred to Jerry Banks's conviction and imprisonment for his sexual abuse of his and Kathryn Banks's son, who was eleven years old at the time.

At the end of a six-day bench trial, the district court concluded that Banks had created the video at issue and found him guilty on all seven counts. On April 16, 2007, Banks was sentenced to life in prison plus sixty years.

On appeal, Banks alleged that, because the Bankses' grandson was not the child of Banks or his wife, the district court committed reversible error in deciding that the grandson fell under the child abuse exception. Banks asserted that the district court "went far beyond" the scope of the White exception when it applied the exception at Banks's trial and refused to allow Banks to invoke the marital communications privilege. In Banks's view, the district court was "really stretching" to find that the relationship between the Bankses and their grandchild was so substantial that it deserved the same protection as a parent-child relationship. Using the district court's reasoning, Banks contended, the child abuse exception would engulf the privilege.

Banks contended that the error was not harmless because Mrs. Banks's statement, which mentioned "past things," forced Banks to explain that his wife was referring to Banks's prior sexual abuse of the couple's minor son, information that Banks otherwise would not have revealed to the district court.

\[241. \text{Id. at 971.} \\
242. \text{Id.} \\
243. \text{See id. at 982 (Alarcón, J., concurring in part and dissenting in part) (citing Transcript of Record, supra note 238, at 371; Indictment, Banks, No. 1:06-cr-00051-BLW-WBS); Appellant's Reply Brief, supra note 224, at 23–24 (citing Transcript of Record, supra note 238, at 1148–49); FBI Press Release, supra note 4.} \\
244. \text{See Banks, 556 F.3d at 971.} \\
245. \text{Judgment, supra note 14, at 1.} \\
246. \text{Id. at 2 (sentencing Banks to life for the count of producing child pornography and sixty years for one count each of possessing, receiving, and transporting child pornography); FBI Press Release, supra note 4. As a registered sex offender, Banks faced a mandatory life sentence for producing child pornography. See 18 U.S.C. § 3559(e) (2006); see also FBI Press Release, \textit{supra} note 4.} \\
247. \text{Appellant's Reply Brief, supra note 224, at 17–21. Banks's appeal related only to his wife's testimony about statements he made to her. See id. Banks also appealed the district court's denial of his motion to suppress the evidence seized pursuant to the search warrant, \textit{id. at 5–16, and the district court's definitions of "masturbation" and "lascivious," \textit{id. at 25–29. The Ninth Circuit affirmed the district court on those two grounds. Banks, 556 F.3d at 980.} \\
248. \text{Appellant's Reply Brief, supra note 224, at 19.} \\
249. \text{Banks, 556 F.3d at 970–71.} \\
250. \text{Appellant's Reply Brief, supra note 224, at 18 (stating that the Bankses' contact with their grandchild was "very infrequent").} \\
251. \text{Id. at 19.} \\
252. \text{Id. at 23–24.} \]
The government responded that the district court did not abuse its discretion in extending the Ninth Circuit's child abuse exception to cases where the victim was the witness-spouse's grandchild. The government cited United States v. Bahe, a case in which the U.S. Court of Appeals for the Tenth Circuit extended the child abuse exception to include cases of abuse of any child in the household. The government also relied upon United States v. Griffin for the principle that comity requires federal courts to apply state law when determining issues of privilege. Based on Griffin, the government argued that because Idaho state law extended the child abuse exception to cases of abuse of any child, the district court should have admitted Kathryn Banks's testimony in federal court as well.

Writing for the majority, Judge Johnnie B. Rawlinson approved of the district court's ruling that even the abuse of the "functional equivalent[s]" of birth or stepchildren should trigger the child abuse exception because those children deserve the same protection. The court found the rationale of Allery helpful, using its balancing test to compare the importance of the privilege with the value of spousal testimony in cases of child abuse when the victim was not the biological or stepchild of the spouses. The Ninth Circuit explained that, because "the bond between marital partners and the functional equivalent of their children would be nearly identical to that between marital partners and their birth or stepchildren, the harm to family harmony and society would be the equivalent of that noted in Allery.

The court concluded, therefore, that the functional equivalent deserves the same protection given to a birth or stepchild and agreed to extend the exception to apply when a defendant abused the functional equivalent of his or her child or stepchild.

The court supported its stance by citing, in addition to Allery, the current state of the child abuse exception in both the federal and state court systems, stating that seven of the nine states within the Ninth Circuit recognized a child abuse exception including the functional equivalent of

253. Id. at 18–19.
254. 128 F.3d 1440 (10th Cir. 1997).
255. Id. at 1446.
256. 440 F.3d 1138 (9th Cir. 2006).
258. See IDAHO R. EVID. 504(d)(1) (eliminating the marital privileges in all child abuse cases).
259. Appellant's Reply Brief, supra note 224, at 19–20. In his reply brief, Banks contended that the government misinterpreted United States v. Griffin. Id. at 20–21 (distinguishing Griffin because that case involved a defendant in prison who lost his right to the marital privilege because of his imprisonment and arguing that the application of Idaho law in Banks was a "vast departure" from Ninth Circuit law, which Griffin specifically warned against).
260. United States v. Banks, 556 F.3d 967, 974–75 (9th Cir. 2009).
261. Id. at 974.
262. Id. at 975.
263. Id.
birth children or a somewhat broader concept.\textsuperscript{264} The court, however, declined to expand the exception beyond that point, not persuaded that every minor child in the household merited the same protection as the functional equivalent of a spouse’s child.\textsuperscript{265}

The majority maintained that it was resolving \textit{Banks} on the case-by-case basis recommended by \textit{Allery}’s interpretation of Rule 501\textsuperscript{266} and that to make “a sweeping ruling that the marital privilege is waived for all grandparents for all time for all circumstances”\textsuperscript{267}—as the majority viewed the dissent’s position\textsuperscript{268}—would be inappropriate.\textsuperscript{269} Under the facts of \textit{Banks}, the court decided that the district court had erred in deciding that the Bankses’ grandson was the “functional equivalent” of their child and should have permitted Banks to invoke the marital communications privilege.\textsuperscript{270} The majority recognized “the abhorrent nature of child sexual abuse,” but considered their analysis highly fact based and saw their reversal of the district court as a simple difference of opinion.\textsuperscript{271}

The majority held that the district court abused its discretion in admitting Kathryn Banks’s testimony,\textsuperscript{272} but found the error to be harmless due to the substantial amount of evidence corroborating the district court’s holding that Banks made the video.\textsuperscript{273} Banks’s conviction, therefore, was upheld.\textsuperscript{274}

\textsuperscript{264} \textit{Id.} Those states include Alaska, Arizona, California, Hawaii, Idaho, Nevada, and Washington. \textit{Id.} at 975 n.2.

\textsuperscript{265} \textit{Id.} at 975 n.3. The court quickly disposed of the U.S. Court of Appeals for the Tenth Circuit’s expansion of the exception to include testimony related to the abuse of any minor child in the household, stating, “No . . . circuit [other than the Tenth Circuit] has adopted such a broad exemption to the federal marital communications privilege. In fact, such an exception would be broader than that adopted by the majority of states within the Ninth Circuit.” \textit{Id.}

\textsuperscript{266} See \textit{United States v. Allery}, 526 F.2d 1362, 1366 (8th Cir. 1975) (reviewing the legislative history behind Congress’s rejection of codified testimonial privileges and concluding that Congress wished any changes to the common-law privileges to be enacted by courts on a case-by-case basis).\textsuperscript{267} \textit{Banks}, 556 F.3d at 977.

\textsuperscript{267} \textit{See infra} notes 275–88 and accompanying text (discussing the dissenting opinion).

\textsuperscript{269} \textit{Banks}, 556 F.3d at 977. \textit{But see} \textit{Trammel v. United States}, 445 U.S. 40, 53 (1980) (vesting the adverse spousal testimony privilege in the witness-spouse only, despite precedent to the contrary); \textit{Funk v. United States}, 290 U.S. 371, 379 (1933) (overturning the rule of spousal incompetency and rejecting the notion that courts are powerless to reject outdated precedent); \textit{Benson v. United States}, 146 U.S. 325, 337 (1892) (revising the rule rendering codefendants incompetent to testify because of a widespread trend among the states of repealing incompetency laws).

\textsuperscript{270} \textit{Banks}, 556 F.3d at 976. The majority wrote that, while the Bankses and their grandson enjoyed a strong grandchild-grandparent relationship that was beneficial to society, it did not create the “overriding policy concerns” that would merit an exception to the marital communications privilege. \textit{Id.}

\textsuperscript{271} \textit{See id.} at 977 (stating, of the district court’s analysis, “In this particular case, under these particular facts, we disagree”).

\textsuperscript{272} \textit{Id.} at 978.

\textsuperscript{273} \textit{Id.} at 977–78. The majority found no evidence of prejudice because “the district court’s finding that Banks created the video made no mention of Banks’s confession to his wife.” \textit{Id.} at 977. Instead, the court focused on the government’s other evidence, including Kathryn Banks’s unprivileged testimony that identified a watch, ring, and couch in the video.
Judge Arthur L. Alarcón vehemently dissented to the majority’s refusal to extend the child abuse exception to the Bankses’ grandson. First, he argued that *United States v. White* was not controlling because the *White* court had addressed only the narrow question of whether the district court had abused its discretion in admitting White’s wife’s testimony that White had threatened to kill her and her daughter. In answering this question, Judge Alarcón maintained, the *White* court viewed the pivotal issue as “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.’” Using that logic in *Banks*, Judge Alarcón argued, Kathryn Banks’s testimony should have been admitted because Banks’s confession to his wife—that he had videotaped himself changing their grandson’s diaper and sent it to pedophiles—“would destroy the harmonious relationship of marital partners,” regardless of whether evidence of that conversation was later admitted at trial. According to Judge Alarcón, Banks’s confession to his wife would have been especially distressing because in 1990 the defendant had pled guilty to sexually abusing their eleven-year-old son, who was now the father of the grandchild in the video. Following Judge Alarcón’s interpretation of *White*, the court’s interest in protecting the Bankses’ marriage could not outweigh its interest in administering justice for Banks’s crime of sexually abusing his grandchild because the couple’s marriage did not benefit from the defendant confiding in his spouse.

In addition to the public policy at issue in *Banks*, Judge Alarcón hotly contested the majority’s application of Rule 501, arguing that it did not give enough weight to state law, much of which provides for broad child abuse exceptions. Judge Alarcón argued that the interpretation of a law in light of reason and experience, as Rule 501 instructs, includes an analysis of the

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274. *Id.* at 980.
275. *Id.* at 980–95 (Alarcón, J., concurring in part and dissenting in part).
276. *Id.* at 981 (citing *United States v. White*, 974 F.2d 1135, 1137 (9th Cir. 1992)). To Judge Alarcón, the *White* court’s holding was limited to the following: “[A] trial court can properly balance the admission of the voluntary testimony of a spouse, regarding the threats by the accused to harm a stepchild, against the privilege that communications between spouses should be treated as confidential and inadmissible in a criminal proceeding to maintain marital harmony.” *Id.* at 982.
277. *Id.* (quoting *White*, 974 F.2d at 1138); cf. *Ryan v. Comm’r*, 568 F.2d 531, 543 (7th Cir. 1977) (“In making the case-by-case determination, it is helpful to weigh the need for truth against the importance of the relationship or policy sought to be furthered by the privilege, and the likelihood that recognition of the privilege will in fact protect that relationship in the factual setting of the case.” (citing *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976))).
278. See *Banks*, 556 F.3d at 982 (Alarcón, J., concurring in part and dissenting in part).
279. *Id.* (citation omitted); FBI Press Release, *supra* note 4.
280. See *Banks*, 556 F.3d at 982 (Alarcón, J., concurring in part and dissenting in part).
281. *Id.* at 982–85; see also *supra* notes 209–14 and accompanying text.
child abuse exception not only in federal case law, but also in the case law and statutes of Idaho and other states.\textsuperscript{282} Stressing that Congress, in enacting Rule 501, intended to "provide the [federal] courts with the flexibility to develop rules of privilege on a case-by-case basis,"\textsuperscript{283} Judge Alarcón charged the majority with failing to consult state law in deciding not to expand the child abuse exception.\textsuperscript{284}

Judge Alarcón then presented a thorough survey of the child abuse exception in federal courts and in those state courts that have not limited their child abuse exceptions to children of the defendant or his or her spouse, highlighting the policy behind each decision.\textsuperscript{285} Judge Alarcón also laid out the various forms of the child abuse exceptions to the marital communications privilege that state legislatures have codified.\textsuperscript{286} Judge Alarcón criticized the majority for failing to explain its decision not to follow the numerous states—and especially the four in the Ninth Circuit—that have adopted broad child abuse exceptions for prosecutions for crimes against any child.\textsuperscript{287}

Judge Alarcón concluded that the district court had conducted a proper Rule 501 analysis, had balanced the policies behind the privilege and society's competing interest in prosecuting child molesters, and had correctly used those factors to admit Kathryn Banks's testimony under the child abuse exception to the marital communications privilege.\textsuperscript{288}

2. Additional Sources Supporting the Ninth Circuit's Interpretation

In refusing to expand the child abuse exception to apply when a defendant abuses a grandchild, the Banks majority's holding is consistent with the Eighth Circuit's decision in United States v. Allery.\textsuperscript{289} Since

\textsuperscript{282} Banks, 556 F.3d at 984-85 (Alarcón, J., concurring in part and dissenting in part). Judge Alarcón found it "indisputable that Congress endorsed inclusion of state law" in its direction of federal courts in Rule 501. Id. at 984 (citing Jaffee v. Redmond, 518 U.S. 1, 8 (1996)); see Jaffee, 518 U.S. at 13 ("[I]t is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience.'").

\textsuperscript{283} Banks, 556 F.3d at 984 (Alarcón, J., concurring in part and dissenting in part) (quoting Trammel v. United States, 445 U.S. 40, 47 (1980)).

\textsuperscript{284} See id. at 985. The majority addressed Judge Alarcón's objections in its opinion, explaining that, although Rule 501 allows federal courts to look to the privileges created by states if they wish, the Rule's emphasis is on federal common law. Id. at 976 (majority opinion). If a court chooses to ignore state law and place greater value on its precedents, therefore, it may. Id.

\textsuperscript{285} Id. at 986-91 (Alarcón, J., concurring in part and dissenting in part) (describing cases in Arkansas, Iowa, Maryland, Massachusetts, Mississippi, New Jersey, Pennsylvania, Texas, and Washington in which the courts adopted broad child abuse exceptions).

\textsuperscript{286} Id. at 991-94 (dividing the forms of the exception into two categories: the exception that eliminates the marital communications privilege in cases of abuse of any child, codified in twenty-six jurisdictions, and the exception that eliminates the privilege when the defendant has committed a crime against a child in the care or custody of either spouse or against a person residing in the home of either spouse, codified in thirteen jurisdictions).

\textsuperscript{287} Id. at 993.

\textsuperscript{288} See id. at 995.

\textsuperscript{289} See generally supra notes 191-207 and accompanying text.
Allery, the first federal case to recognize a child abuse exception, the Eighth Circuit has not revisited the issue. Now that other federal courts have relied upon Allery in crafting broader versions of the child abuse exception, the Eighth Circuit has become the most conservative of all the circuits that have child abuse exceptions.

The Banks majority opinion also follows the exceptions codified in both proposed Federal Rule of Evidence 505, which provided for a child abuse exception applying only in cases of abuse of a child of the defendant or the witness-spouse, and Uniform Rule of Evidence 504, which provides a slightly broader child abuse exception eliminating the privilege for crimes against a minor child or stepchild of the defendant as well as crimes committed against an individual residing in the couple’s household. Because the proposed Rules resulted from years of research by respected members of the legal community, most courts regard the recommendations of the Advisory Committee and the Supreme Court as a useful guide for Rule 501 analyses despite the fact that Congress declined to adopt the proposed rules.

290. See infra Part II.B.2.
291. See United States v. Allery, 526 F.2d 1362 (8th Cir. 1975) (prohibiting the invocation of the adverse spousal testimony privilege only when the witness-spouse or his or her child or stepchild was the victim of the defendant’s crime).
293. See id. Proposed Rule 505 codifies the adverse spousal testimony privilege and, by not specifically codifying it, eliminates the marital communications privilege. Id. Proposed Rule 505 provides three exceptions, one of which applies when the defendant is on trial for the abuse of his or her spouse or a child of either spouse. Id.
294. See UNIF. R. EVID. 504(d), 13A U.L.A. 95–96 (2004); supra note 211 and accompanying text.
295. See UNIF. R. EVID. 504(d), 13A U.L.A. 95–96 (“Exceptions. There is no privilege under this rule . . . in any proceeding in which one spouse is charged with a crime or tort against the person or property of the other, a minor child of either, an individual residing in the household of either, or a third person if the crime or tort is committed in the course of committing a crime or tort [against any of the individuals previously named in this sentence].”). But see supra note 211 and accompanying text (describing courts’ flexibility when determining if an individual resides in a household for purposes of rules of evidence containing this language).
296. See supra note 53 (listing members of the Advisory Committee responsible for promulgating the Federal Rules of Evidence).
297. See 2 SALTZBURG ET AL., supra note 87, § 501.02[3], at 501–11 (stating that the proposed rules are a “useful reference point” because they were carefully developed by a skilled advisory committee, were adopted by the Supreme Court, and for the most part, simply restated current federal common law (citing In re Grand Jury Investigation, 918 F.2d 374, 380 (3d Cir. 1990))); see, e.g., Jaffee v. Redmond, 518 U.S. 1, 10–14 (1996) (citing FED. R. EVID. 504 advisory committee’s note, 56 F.R.D. 183, 242 (1972)); cf. United States v. Gillock, 445 U.S. 360, 367–69 (1980) (explaining that although absence of a legislative privilege from the Supreme Court’s list of proposed privileges “would not compel the federal courts to refuse to recognize [it because it was] omitted from the proposal, it does suggest that the claimed privilege was not thought to be either indelibly ensconced in our common law or an imperative of federalism”). But see DANIEL J. CAPRA, ADVISORY COMMITTEE NOTES TO THE FEDERAL RULES OF EVIDENCE THAT MAY REQUIRE CLARIFICATION 5–7, 31 (1998) (explaining that the Advisory Committee note for Rule 501 referred to rules
B. Jurisdictions with Broad Child Abuse Exceptions

Although the Ninth Circuit was reluctant to adopt a child abuse exception broad enough to protect a witness-spouse’s grandchild, other federal courts have shown a greater willingness to recognize expansive child abuse exceptions to the marital privileges. This section discusses the federal courts, including military courts, the Tenth Circuit, and the U.S. District Court for the Western District of Texas, which have adopted child abuse exceptions to the marital privileges that are broader than the exception adopted by the Ninth Circuit in *Banks*. Each jurisdiction’s form of the exception will be discussed in turn.

1. The Military’s Broad Child Abuse Exception, As Codified in Military Rule of Evidence 504(D)

Until recently, Military Rule of Evidence 504 codified a relatively constrained child abuse exception to the marital privileges. In 2008, however, after critics called for the adoption of a more protective child abuse exception, drafters of the Military Rules of Evidence amended Rule 504 to provide for a much broadened exception. This section describes the evolution of Military Rule of Evidence 504.

The military justice system is separate from the federal court system and has codified its testimonial privileges in the Military Rules of Evidence, which are used in courts-martial, or military courts presiding over criminal proceedings. In his article *Expanding the ‘Child of Either’ Exception to the Husband-Wife Privilege Under the New M.R.E. 504(D)*, Captain Damian P. Richard of the U.S. Marine Corps discusses spousal privileges in the Military Rules of Evidence. These rules, unlike the Federal Rules of Evidence, codify common-law evidentiary privileges. In addition to the privileges and corresponding exceptions specified in the Rules of Evidence, however, courts-martial are also free to recognize the privileges and exceptions federal courts have employed during criminal trials according to that were never adopted and warning against treating the Advisory Committee proposals or notes as “a totally accurate description of federal common law”).

298. These courts’ exceptions apply only to either the adverse spousal testimony privilege or the marital communications privilege. None of the circuits have specifically stated that the exceptions would apply to either privilege. It appears, however, that this distinction depends only on the privilege invoked by a spouse in those particular cases, and has not arisen out of a conscious effort on the part of the circuits to adopt the exception for one privilege but not the other.

299. MIL. R. EVID. 504(c)(2)(A).

300. See MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 201(d) (2008). Courts-martial have jurisdiction over prosecutions of military offenses as well as prosecutions of crimes that violate both local and military law. *Id.*


Federal Rule of Evidence 501, as long as the privilege or exception is not inconsistent with the Military Rules of Evidence.\textsuperscript{303}

Military Rule of Evidence 504(c)(2)(A) prohibits spouses from invoking either marital privilege in “proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either . . . “\textsuperscript{304} In 2000 and 2003, the U.S. Court of Appeals for the Armed Forces interpreted the meaning of the phrase “a child of either” in Rule 504 in such a way that the exception did not encompass the abuse of children other than those of the defendant and his or her spouse.\textsuperscript{305}

Scholars subsequently called for a change in the military justice system.\textsuperscript{306} Proponents of a broad child abuse exception cited the current tendency to restrict the application of the marital privileges by expanding the exceptions to the rule, as evidenced in case law in the Tenth Circuit, the District of Columbia, and thirty-three state jurisdictions.\textsuperscript{307} Scholars also cited military-specific policy rationale, arguing, “An exception to the marital privileges covering minor children over whom a spouse is guardian or in loco parentis would . . . help servicemembers effectively perform their military duties while deployed because they would have an increased belief in the security of their children,” who were often cared for by adults other than their parents.\textsuperscript{308} Concurring and dissenting judges from prior cases have made similar arguments over the years.\textsuperscript{309}

\begin{footnotes}
\item[303] See MIL. R. EVID. 501(a)(4); see, e.g., United States v. Smith, 30 M.J. 1022, 1025–27 (A.F.C.M.R. 1990) (adopting the federal common-law exception to the marital communications privilege that allows the government to compel a spouse’s testimony regarding confidential spousal communications when the two were joint participants in a criminal venture).

\item[304] MIL. R. EVID. 504(c)(2)(A). Two additional exceptions state that spousal testimony may be compelled when the marriage was a “sham” or in cases in which the defendant spouse is charged with the prostitution or immoral exploitation of his or her spouse. See MIL. R. EVID. 504(c)(2)(B)-(C).

\item[305] In United States v. McCollum, 58 M.J. 323 (C.A.A.F. 2003), the court held that, because the defendant’s wife’s fourteen-year-old, mentally retarded sister, who had lived with the couple for one month, was not a child of either spouse under Rule 504, the witness-spouse’s testimony about her husband’s confession that he had raped the child was inadmissible. See id. at 334–42. The court acknowledged that an expanded exception would well serve military personnel, whose children often stay with—and may be abused by—relatives and friends while their parents are deployed in military service, as well as busy, nonmilitary working parents, many of whom must place their children in daycare, where they are at risk of being abused. Id. at 342 n.6. The court, however, felt that “it is the responsibility of the political elements of government to balance these competing considerations in law.” Id.; see also United States v. McElhaney, 54 M.J. 120, 131–32 (C.A.A.F. 2000) (declining to create an exception to the marital communications privilege that would apply in cases of abuse of de facto children).

\item[306] See, e.g., Connor, supra note 40, at 123–24.

\item[307] Richard, supra note 202, at 162–63.

\item[308] Id. at 170 (citing Connor, supra note 40, at 179–80).

\item[309] See, e.g., McCollum, 58 M.J. at 344 (Crawford, J., concurring) (demanding de facto child status for a child rape victim so that the exception to the marital communications privilege would apply); McElhaney, 54 M.J. at 137 (Sullivan, J., concurring in part and dissenting in part) (calling for a broader exception to the marital privileges to include a de facto child); United States v. McCarty, 45 M.J. 334, 336–37 (C.A.A.F. 1996) (Sullivan, J.,
In 2007, drafters of the *Manual for Courts-Martial* explained that the prior distinction between legal and de facto children "resulted in unwarranted discrimination among child victims and ran counter to the public policy of protecting children . . . ."\(^{310}\) In response, the drafters amended the definition of "child of either" in Military Rule of Evidence 504 so that the privileges could not be invoked during a trial for a crime committed against almost any child.\(^{311}\)

2. Federal Courts Adopting Expansive Child Abuse Exceptions

This section details how circuits other than the Eighth and Ninth Circuits have interpreted Rule 501 to form child abuse exceptions to the marital privileges. In the four circuits that have created child abuse exceptions to the marital privileges,\(^{312}\) each has adopted a different form of the exception. The U.S. District Court for the Western District of Texas, located in the Fifth Circuit, has forged the broadest exception, holding that the marital communications privilege should not apply to statements relating to a crime where the victim is a child, even when the abuse did not occur in the home.\(^{313}\) The Tenth Circuit recognizes an exception to the marital communications privilege in prosecutions for the abuse of any minor child

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\(^{310}\) 2 *STEPHEN A. SALTZBURG, MILITARY RULES OF EVIDENCE MANUAL* § 504.03a (Supp. 2009).

\(^{311}\) Richard, *supra* note 202, at 156; *see* MIL. R. EVD. 504(d). The updated definition provides,

1. The term "a child of either" includes not only a biological child, adopted child, or ward of one of the spouses but also includes a child who is under the permanent or temporary physical custody of one of the spouses, regardless of the existence of a legal parent-child relationship. For purposes of this rule only, a child is: (i) an individual under the age of 18; or (ii) an individual with a mental handicap who functions under the age of 18.

2. The term "temporary physical custody" includes instances where a parent entrusts his or her child with another. There is no minimum amount of time necessary to establish temporary physical custody nor must there be a written agreement. Rather, the focus is on the parent's agreement with another for assuming parental responsibility for the child. For example, temporary physical custody may include instances where a parent entrusts another with the care of their child for recurring care or during absences due to temporary duty or deployments.

*Id.*

\(^{312}\) These circuit courts are the U.S. Courts of Appeals for the Fifth, Eighth, Ninth, and Tenth Circuits. The U.S. Court of Appeals for the Fourth Circuit was the first federal court to mention the possibility of a child abuse exception in *United States v. Shipp*, 409 F.2d 33 (4th Cir. 1969), but the issue was not determinative in that case. *See id.* at 35 n.3 (discussing the state court's holding that the spousal abuse exception also applies when the victim is the spouse's child).

\(^{313}\) *See* United States *v. Martinez*, 44 F. Supp. 2d 835 (W.D. Tex. 1999); *infra* notes 325–33 and accompanying text.
living in the defendant and witness’s home, regardless of the child’s relationship to the spouses. Each court’s approach is discussed in turn.

In United States v. Bahe, the Tenth Circuit extended the exception to the marital communications privilege to include confidential communications relating to the abuse of a minor child living in the home, regardless of whether the victim was the child of the defendant or his or her spouse. In Bahe, a jury convicted the defendant of sexually abusing an eleven-year-old female relative. Bahe’s wife had testified voluntarily at trial as to a specific way the defendant initiated sex with her. The district court admitted her testimony because it was “precisely the act” described by the eleven-year-old victim. The district court agreed to admit Bahe’s wife’s testimony to lend credibility to the child’s description of Bahe’s sexual abuse.

Bahe appealed his conviction, arguing that the district court erred in admitting testimony of his wife. The Tenth Circuit acknowledged that it had not yet adopted an exception to the marital communications privilege that would allow a spouse’s testimony in cases of abuse of a child not related to the defendant. The circuit court held in Bahe, however, that as a matter of policy, there is “no significant difference . . . between a crime against a child of the married couple, against a stepchild living in the home or . . . against an eleven-year-old relative visiting in the home.” In formulating its expansion of the privilege, the court echoed Allery’s reasoning that child abuse is a “horrendous crime” that usually occurs in the home and is often hidden unwittingly—or, out of fear of the abuser’s threats, intentionally—by the child. Based on its “reason and experience,” the court concluded that it would be unconscionable to allow a privilege based on promoting trusting and loving communications to prevent a justifiably upset witness from testifying against his or her pedophile spouse.

314. See United States v. Bahe, 128 F.3d 1440 (10th Cir. 1997); infra notes 315–24 and accompanying text.
315. Bahe, 128 F.3d at 1446.
316. Id. at 1441.
317. Id.
318. Id.
319. Id.
320. Id.
321. Id.
322. See id.
323. Id.; see supra notes 191–207.
324. Although the United States v. Bahe court’s approach was clear-cut with regard to the marital communications privilege, the Tenth Circuit has not been consistent in its application of the exception when defendants invoke the adverse spousal testimony privilege. Compare United States v. Jarvison, 409 F.3d 1221, 1231–32 (10th Cir. 2005) (stating that a child abuse exception to the adverse spousal testimony privilege is “not currently recognized by any federal court”), and Bahe, 128 F.3d at 1442 (arguing that it is “clear” that the district court could not compel the defendant’s wife to testify against her husband if she did not choose to testify (citing Trammel v. United States, 445 U.S. 40, 53 (1980))), with United States v. Castillo, 140 F.3d 874, 884–85 (10th Cir. 1998) (prohibiting
United States v. Martinez, a case in the Western District of Texas, introduced additional rationales for the child abuse exception. In this case, the government charged the defendant with eleven acts of child abuse against her two minor sons while they were patients in a hospital on Lackland Air Force Base. Martinez invoked the marital communications privilege in a motion to suppress her ex-husband's testimony about communications between them during their marriage. The district court denied Martinez's motion to suppress and adopted a broad exception to the privilege that would apply in prosecutions for crimes committed against all minors.

The Martinez court recognized its ability under Rule 501 to change the marital privilege and cited instances in which other courts, both federal and state, had expanded the spousal abuse exception to include child victims. Balancing society's competing interests in protecting the marital relationship and bringing child abusers to justice, the Martinez court decided that the importance of protecting "voiceless and powerless" children overwhelmed any value in the marital communications privilege. The court also suggested that child abuse was a direct offense to the institution of marriage because the marital relationship exists to "nurture and protect its children," and not merely to provide a safe haven in which spouses may freely share their secrets with one another.

To bolster its position, the district court relied on Trammel's oft-cited criticism of the privilege: when one spouse is willing to testify against the other in a criminal case, the marriage is most likely damaged beyond repair,

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the defendant's invocation of the adverse spousal testimony privilege because he was on trial for sexually abusing his two daughters, but failing to make explicit its intention to apply Bahe's exception to both marital privileges, and United States v. Allery, 526 F.2d 1362 (8th Cir. 1975) (forming a child abuse exception to the adverse spousal testimony privilege).

326. Id. at 836.
327. Id. at 837. The Martinez court's reasoning seemed to focus on children abused by parents or stepparents within the home. See id. at 836–37 (discussing the damage a marriage sustains "when the defendant-spouse is accused of abusing the children of that marriage" and children who are "abused at the hands of a parent"). The language of the court's holding, however, that "the marital communications privilege should not apply to statements relating to a crime where the victim is a minor child," does not seem to limit the exception to children related to the defendant, spouse, or children abused within the household. Id. at 837.
328. Id. at 836–37 (citing FED. R. EVID. 501; Trammel, 445 U.S. at 47; Bahe, 128 F.3d at 1446; United States v. White, 974 F.2d 1135, 1137–38 (9th Cir. 1992); Allery, 526 F.2d at 1367; Ludwig v. State, 931 S.W.2d 239, 244 (Tex. Crim. App. 1996) (en banc)).
329. Id. 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. . . . [A] contrary rule would make children a target population within the marital enclave." (quoting 25 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5593, at 761–62 (1989)) (citing 2 DAVID W. LOUSELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 218, at 886 (rev. ed. 1985))).
330. Id.
leaving nothing for the privilege to protect. The *Martinez* court posited that this criticism is especially applicable when one spouse is on trial for child abuse.

3. Additional Sources Supporting Broad Child Abuse Exceptions

The reasoning used by state courts adopting child abuse exceptions can be instructive, both in illuminating the reasoning courts have used in adopting such exceptions and also for federal courts looking to state courts for guidance under Rule 501.

In *Villalta v. Commonwealth*, the Supreme Judicial Court of Massachusetts interpreted a Massachusetts statute that eliminated the adverse testimony and marital communications privileges "in any proceeding relating to child abuse." The court construed the phrase "child abuse" literally and held that the privilege could not be invoked when the abuse of any child was at issue at trial. The court stated that there was no reason to deny the privilege when the child victim was related to the defendant or his spouse but to allow the privilege when the victim was unrelated. The court asserted that crimes against both types of child victims were equally serious, produced the same societal interest in prosecuting and punishing the abuser, and caused the same evidentiary need for a spouse’s testimony. In addition, the court held that compelling a spouse to testify in either case was equally threatening to the couple’s

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332. Id. (citing *Trammel*, 445 U.S. at 52); cf. United States v. Tsinnijinnie, 601 F.2d 1035, 1039 (9th Cir. 1979) ("[W]hen a marriage has deteriorated to the point where one spouse makes statements damaging to the other, that marriage will usually proceed to its fate regardless of how the spousal privilege is applied."). But see supra note 130 (arguing that *Trammel*’s reasoning is misguided because a marriage is not necessarily beyond repair simply because one spouse is willing to testify against the other). This reasoning, although compelling for the adverse spousal testimony privilege, does not apply to the marital communications privilege. It incorrectly assumes that the marital communications privilege exists to protect the defendant’s marriage only. While this policy drives the adverse spousal testimony privilege, the marital communications privilege seeks to protect all marriages by allowing spouses to confide in each other without fearing that their spouses will later air their private thoughts in court. See Connor, supra note 40, at 142–43. This is why the marital communications privilege may be invoked even after the defendant’s marriage has dissolved, as was the case in *Martinez*. See *Martinez*, 44 F. Supp. 2d at 836; see also United States v. Marashi, 913 F.2d 724, 730 (9th Cir. 1990).

335. MASS. ANN. LAWS ch. 233, § 20 (LexisNexis 2009).
336. Id.; *Villalta*, 702 N.E.2d at 1152. In *Villalta*, the defendant’s wife attempted to assert the adverse spousal testimony privilege at trial when the government called her to testify against her husband at his prosecution for the alleged rape of a two-year-old child whom the wife babysat periodically in the couple’s home. Id. at 1149–50.

337. *Villalta*, 702 N.E.2d at 1152.
338. Id.
339. Id.
marriage.\textsuperscript{340} As a result, the court reversed the trial court’s grant of the witness-spouse’s invocation of the adverse spousal testimony privilege.\textsuperscript{341}

In another state court case, \textit{J.S. v. R.T.H.},\textsuperscript{342} the New Jersey Supreme Court confronted the issue of whether a wife who suspects—or should suspect—her husband of sexually abusing their neighbors’ children has a duty of care to prevent that abuse.\textsuperscript{343} Although the court did not confront the marital privilege directly, the issue of the wife’s negligence necessitated a discussion of the interplay between society’s interest in preventing child abuse and a couple’s right to privacy in their marriage.\textsuperscript{344} The court ruled that the defendant’s wife may have been negligent, reversing the trial court’s grant of summary judgment.\textsuperscript{345} The court reasoned that although conduct involving sexual abuse is “secretive, clandestine, and furtive,”\textsuperscript{346} a male abuser’s wife is in a unique position to observe signs of sexual abuse because the abuser is often a married man, the abuse usually occurs in the home of the abuser or the victim, and the offender—and presumably his wife—often knows the child.\textsuperscript{347} The court briefly noted the defendant’s interest in marital privacy,\textsuperscript{348} but concluded that society’s interest in protecting children from sexual abuse outweighs the defendant’s right to privacy.\textsuperscript{349} In support of the latter point, the court noted that New Jersey legislatures have not been hesitant to pass statutes prescribing harsh penalties and drastic limitations of civil liberties for child abusers,
expressing "New Jersey's strong public policy favoring protection of children over the privacy of an offending adult."\(^{350}\)

In addition to state courts' rationales, there are many public policy arguments for creating child abuse exceptions to the marital privileges. The societal ramifications of child abuse are vast.\(^{351}\) Abused children are 25% more likely to become pregnant as teenagers and 59% more likely to be arrested as juveniles.\(^{352}\) The consequences do not end once the abused reach adulthood. 14% of imprisoned men and 36% of imprisoned women in the United States were abused as children.\(^{353}\) Adults who were abused as children are 28% more likely than a nonabused person to be arrested and 30% more likely to become violent criminals.\(^{354}\) Sexual abuse is especially pernicious: sexually abused children are 2.5 times more likely to develop alcohol abuse problems and 3.8 times more likely to develop drug addiction.\(^{355}\) Prohibiting the invocation of the marital privileges allows the government to secure convictions of child abusers more often, accomplishing the four "classical" goals of punishment: retribution, rehabilitation, deterrence, and incapacitation.\(^{356}\) The stark statistics above underscore the importance of accomplishing these goals.

In advocating for the formation or expansion of child abuse exceptions, many courts and scholars have argued that the policy behind the marital privileges has eroded, thereby tipping the balance in favor of an exception.\(^{357}\) One particular criticism of the marital privileges—the marital communications privilege in particular—is that they are ineffective.\(^{358}\) Detractors argue that because married couples are unaware of the existence of the marital communications privilege and, therefore, do not rely on it when deciding whether to confide in each other, it cannot serve its purpose of encouraging marital communication.\(^{359}\) A related criticism of the


\(^{351}\) See, e.g., Childhelp, supra note 201. The statistics that follow do not distinguish between sexual abuse and other forms of abuse or neglect.

\(^{352}\) Id.

\(^{353}\) Id.

\(^{354}\) Id.

\(^{355}\) Id.


\(^{357}\) See, e.g., United States v. Tsinnijinnie, 601 F.2d 1035, 1038 (9th Cir. 1979); 1 BROUN ET AL., supra note 127, § 86, at 340–41; supra note 348 and accompanying text.

\(^{358}\) See 1 BROUN ET AL., supra note 127, § 86, at 340–41 (stating that spouses confide in each other because they trust one another, not because the marital communications privilege protects their conversations); supra note 348 and accompanying text; see, e.g., Tsinnijinnie, 601 F.2d at 1039 ("Experience demonstrates that the potential benefits of the marital privilege are often more imaginary than real.").

\(^{359}\) See Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 245–46 (1972) (acknowledging the confidential communication privilege is one "of whose existence the parties in all likelihood are unaware"); 1 BROUN ET AL., supra note 127, § 86, at
adverse spousal testimony privilege is that when one spouse is willing to testify against another, the marriage is already doomed and cannot be helped by the marital privilege. Finally, some critics of the marital privileges believe that the privileges are part of the sexist tradition of husbands' legal domination of their wives. To these theorists, the marital privileges are tools employed disproportionately by men to prevent their wives from asserting any power over them.

In summary, federal courts have been inconsistent in their approaches to the child abuse exception to the marital privileges. The Eighth and Ninth Circuits have limited the application of the child abuse exception to a child of either spouse or the functional equivalent of a child of either spouse, respectively. Other federal courts addressing the issue, however, have adopted more expansive forms of the child abuse exception. These courts are the military courts-martial, the Tenth Circuit, and the Western District of Texas.

III. FEDERAL COURTS SHOULD ADOPT AN EXPANSIVE CHILD ABUSE EXCEPTION TO THE TWO MARITAL PRIVILEGES

Although Jerry Banks's conviction thankfully remained intact on other grounds, Banks shows the danger in the chaotic system of marital privileges and exceptions resulting from Rule 501, under which each federal court is left to its own devices in deciding whether a party or witness may invoke a marital privilege. Banks was described by prosecutors as one of the “worst sex offenders ever seen in Idaho,” but, had other evidence of his guilt not existed, his invocation of the marital privilege may have allowed him to

340 (stating that the anticipation of legal proceedings “is not one of those factors which materially influence in daily life the degree of fullness of marital disclosures”); Robert M. Hutchins & Donald Slesinger, Some Observations on the Law of Evidence: Family Relations, 13 MINN. L. REV. 675, 682 (1929) (suggesting that lawyers are the only citizens aware of the marital communications privilege and that their marriages are no more harmonious than those of other professionals); see also supra note 348 and accompanying text (citing New Jersey courts as doubting the effectiveness of the marital privileges). But see Mark Reutlinger, Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence As They Affect Marital Privilege, 61 CAL. L. REV 1353, 1374–78 (1973) (discussing the validity of the presumption that individuals are unaware of the privilege); Watts, supra note 39, at 597 (arguing that even though most couples are unaware of the marital privileges, they expect complete confidentiality).

360. See supra notes 130, 332–33 and accompanying text.

361. See, e.g., Trammel v. United States, 445 U.S. 40, 52 (1980) (describing the idea that women lack a separate legal identity from their husbands as “archaic” and holding that only the witness-spouse may hold the adverse spousal testimony privilege); Tsinnijinnie, 601 F.2d at 1038 (stating that much criticism of the marital privileges “stems from distaste for the paternalistic attitude toward marriage it reflects”).

362. See 8 WIGMORE, supra note 97, § 2227, at 212 (describing the common-law adverse spousal testimony privilege as held by a husband to preclude the testimony of his wife); Privileged Communications, supra note 153, at 1587 n.170 (estimating that ninety percent of the spouses who invoke a marital privilege at trial are husbands).

escape a mandatory life sentence at a retrial without his wife’s testimony.\textsuperscript{364} Such a result would shock the conscience.

Federal courts should adopt a common-law exception to both the marital communications privilege and the adverse spousal testimony privilege that would apply in cases of abuse of any minor child,\textsuperscript{365} regardless of whether the child is related to the defendant or his spouse or whether the child lives in their household.\textsuperscript{366} Because this exception would apply to both the adverse spousal testimony privilege, held by the witness-spouse,\textsuperscript{367} and the marital communications privilege, held by both spouses,\textsuperscript{368} it would dually prevent a defendant from precluding his or her spouse’s voluntary testimony and allow a court to compel an unwilling witness-spouse to testify.\textsuperscript{369}

The importance of achieving justice for child victims of sexual and physical abuse easily defeats the competing policy of maintaining the

\textsuperscript{364} See supra note 246 and accompanying text.

\textsuperscript{365} The types of abuse contemplated by this exception are limited to physical and sexual abuse and do not include other potential crimes against children, such as financial fraud. The latter category of criminal activity does not trigger the policy concerns that compel an expansive exception. Similarly, this Note’s proposed exception also raises the question of which victims would be “minor children” for purposes of the exception. Although this Note finds it futile to lay such specific parameters of the exception, revised Military Rule of Evidence 504 may provide courts with helpful guidance. See Mil. R. Evid. 504(d)(1) (“[A] child is: (i) an individual under the age of 18; or (ii) an individual with a mental handicap who functions under the age of 18.”).

\textsuperscript{366} Although a Federal Rule of Evidence codifying such an exception would be ideal, the Committee on Rules of Practice and Procedure has concluded that it is “neither necessary nor desirable” to amend the Rules to include an exception protecting the child of either the defendant or the witness-spouse. See Judicial Conference of the U.S., Comm. on Rules of Practice & Procedure, Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a “Harm to Child” Exception to the Marital Privileges 6–10 (2007), available at http://www.uscourts.gov/rules/Harm_to_Child_Report_to_Congress.pdf. The Committee so concluded not because it found the exception objectionable, but because the amendment did not meet the high burden needed to begin the arduous process of amending a rule of evidence. See id. (finding that there is no significant circuit split and that the existing rule was neither unworkable nor unconstitutional). The exception this Note proposes is admittedly broader than the proposed amendment rejected by the Committee, but the adoption of the proposed exception is both necessary and desirable in individual courts.

\textsuperscript{367} See supra note 118 and accompanying text.

\textsuperscript{368} See supra note 144 and accompanying text.

\textsuperscript{369} In contrast to this Note’s suggested approach, some states have chosen to codify a child abuse exception for the marital communications privilege, but not the adverse spousal testimony privilege. See supra notes 210–14. These jurisdictions reason that the child abuse exception aims to prevent only the defendant—not the witness-spouse—from invoking the privilege, so when the defendant does not hold the adverse spousal testimony privilege, there is no need for an exception to it. See, e.g., State v. Taylor, 642 So. 2d 160, 165–66 (La. 1994) (explaining that Louisiana has not adopted any exceptions to the adverse spousal testimony privilege because the privilege may not be exercised by the defendant). This Note, however, rejects that reasoning and posits that during child abuse proceedings, neither spouse should be able to invoke a marital privilege. Although this may result in the involuntary testimony of a witness-spouse, society’s interest in admitting the witness-spouse’s testimony in child abuse cases outweighs its desire not to compel spouses to testify against one another.
sanctity of marriages. There is no sanctity in a marriage that has stayed
together at the expense of a child’s welfare. An expanded exception to the
marital privileges will allow prosecutors to present a complete case against
defendants guilty of monstrous acts of child abuse.

Current forms of the child abuse exception are based on arbitrary and
illogical parameters. Federal courts must adhere to the Federal Rules of
Evidence when developing evidentiary law, but Rule 501 allows for a broad
child abuse exception. Under Rule 501, federal courts are free to use their
“reason and experience” to change the common-law rules of privilege when
necessary. A federal court’s reason and experience analysis balances the
benefit of a privilege with the value of the testimony at issue. In child
abuse prosecutions, the value of the witness-spouse’s testimony always
outweighs the privilege’s benefit.

A. The Illogical Evolution of the Child Abuse Exception in Federal Courts

Due to Congress’s refusal to codify the evidentiary privileges in the
Federal Rules of Evidence, federal courts have developed privileges and
exceptions only as the need has arisen. As a result, federal common-law
privileges have developed unevenly, leaving child victims of abuse better
protected in some circuits than in others. The boundaries courts have
drawn between child victims, based on whether the child is related to the
defendant or whether the defendant abused the child in the defendant’s
home, came about because the child abuse exception grew out of the
spousal abuse exception, which was premised on the belief that a
defendant’s abuse of his or her spouse damaged the harmony of the
couple’s marriage and so did not promote the purpose of the privilege. As
a result, the main question courts asked when considering the adoption
of a child abuse exception was whether the abuse of the child upset the
family harmony, which was only the case if the minor was the child of the
witness-spouse.

Recent decisions have cited numerous policy reasons to adopt the child
abuse exception beyond the question of whether the crime disrupts the
family harmony of the couple. This renders the distinctions among child
abuse victims moot. Whether a child is related to the defendant or his
spouse does not make the protection of that child more or less important.
The question of whether a crime of child abuse is a crime against the
defendant’s spouse is irrelevant. Child abuse is an offense not only against
the victim, but also against society as a whole.

370. See supra Part II (describing federal courts’ various approaches to the child abuse
exception).
371. See supra notes 85–89 and accompanying text.
372. See supra notes 51–89 and accompanying text.
373. See supra Part II.
374. See supra notes 188–90 and accompanying text.
375. See supra note 198 and accompanying text.
376. See Part II.B.
This Note’s proposed exception to the marital privileges is comparable to the exception developed in the Tenth Circuit, but goes further in that it would also apply in cases of child abuse occurring outside the home. Although an exception like that applied by the Tenth Circuit would be sufficiently broad in cases of child abuse occurring in the defendant’s home, it stops short of protecting children abused in their own homes or, for instance, at school or daycare, where many children spend the majority of their time. There is no reason to base the scope of the protection of children on the location of their abuse.

B. The Rule 501 Analysis

This Note’s proposed exception, while unprecedented in its breadth among the courts of appeals, would fall well within the discretion provided by Rule 501. In enacting the Rule, Congress expressed its intention that courts make changes to privilege law on a case-by-case basis. However, in any case of child abuse, a proper Rule 501 reason and experience analysis will result in an exception to the marital privileges.

A survey of recent federal court decisions shows an increasing willingness to limit the marital privileges if not yet to the extent suggested in this Note. In enacting Rule 501, however, Congress made clear that federal courts may—and should—consider state law when developing the law of privileges. A review of state privilege law, both codified and developed through case law, reveals that sixteen states prohibit spouses from invoking one or both of the marital privileges when the defendant has abused any child. While these states alone do not establish an overwhelming trend, of the other thirty-three jurisdictions with child abuse exceptions, in all but twelve, even minors who are not the child of either spouse are protected. These figures include twelve states employing an exception in cases of abuse of any person residing in the home and nine states adopting exceptions that prohibit the invocation of marital privileges when the defendant is charged with abusing a child in the home.

377. See United States v. Bahe, 128 F.3d 1440, 1441 (10th Cir. 1997) (recognizing an exception to the marital communications privilege for spousal testimony relating to the abuse of a minor child within the spouses’ household); supra notes 315–24 and accompanying text.
378. See United States v. McCollum, 58 M.J. 323, 342 n.6 (C.A.A.F. 2003) (recognizing the equal importance of protecting children whose parents must leave them in daycare facilities or other locations for purposes of supervision); supra notes 308–09 and accompanying text.
379. See supra notes 89, 266 and accompanying text.
380. See supra Part II.B.
381. See supra notes 264, 282 and accompanying text.
382. See supra notes 209–14 and accompanying text.
383. See supra note 210 and accompanying text.
384. See supra notes 209–14 and accompanying text.
385. Depending on a jurisdiction’s interpretation of “residing,” these exceptions would cover at least some cases of abuse of children not related to either spouse. See supra note 211 and accompanying text.
care, custody, or control of either spouse. Thus, the trend among state jurisdictions certainly supports the adoption of a broader exception by all federal circuits under Rule 501.

In addition, there is no reason a Rule 501 “reason and experience analysis” may not include the consultation of state statutes other than those codifying marital privileges. Here, one finds a disconnect between statutes aiming to prevent child abuse, such as Megan’s Law, and narrow exceptions to the marital privileges. It is inconsistent for legislatures to curtail child abusers’ civil liberties to prevent them from abusing another child, but at the same time to allow courts to undermine the prosecution of those same sex offenders when they are arrested. The willingness of legislators to enact comprehensive laws providing harsh penalties for sex offenders demonstrates their belief that the public policy of preventing future child abuse outweighs the offenders’ individual rights. Courts should heed the public policy evinced by statutes such as Megan’s Law so that both legislative and judicial action promote the prosecution of perpetrators of child abuse.

C. Utilizing the Federal Courts’ Balancing Tests To Support an Expansive Child Abuse Exception

Courts must abide by Rule 501, but, as described in Part I.C, federal courts utilize two additional types of balancing tests when determining whether a privilege may be invoked: Wigmore’s utilitarian four-factor test and a public policy balancing test that courts turn to when deciding issues of both the adverse spousal testimony privilege and the marital communications privilege. Wigmore’s test does not support the marital communications privilege when invoked in a child abuse prosecution. The public policy test leads to the same conclusion regarding both marital privileges.

1. Wigmore’s Utilitarian Test

The marital communications privilege fails Wigmore’s four-part balancing test for privileges protecting communications made in
confidence.\textsuperscript{390} The privilege fulfills the first factor, but may fail the second, and surely fails the last two.\textsuperscript{391}

The first factor in Wigmore's test requires that the communicator reasonably expect confidentiality.\textsuperscript{392} This factor depends on the circumstances of the communications, but, in general, it seems likely that defendants disclosing their abuse of a child to a spouse do so because they expect their statement to be confidential. This Note assumes that the marital privileges meet this condition.

Wigmore's second factor requires that the expected confidentiality of the communication is essential in maintaining the relationship between the speaker and the listener.\textsuperscript{393} The marital communications privilege rarely satisfies this factor because spouses generally are unaware of the privilege and therefore do not rely upon it to preserve the confidentiality of their communications.\textsuperscript{394} It is widely believed that, other than lawyers, virtually no one is aware of the existence of the marital privileges.\textsuperscript{395} Even lawyers who are familiar with the marital communications privilege do not experience more marital harmony than other professionals.\textsuperscript{396} On the other hand, when a child abuser discusses the abuse with his or her spouse, it is possible that the abuser is aware of the privilege and would not otherwise disclose the abuse if not for the privilege's existence. In Banks's case, this is especially likely since he had already experienced a criminal prosecution for the molestation of his son\textsuperscript{397} and therefore may have been aware of the existence of the marital communications privilege.

Third, the Wigmore test requires that the relationship between speaker and listener be "one which in the opinion of the community ought to be sedulously fostered."\textsuperscript{398} It is doubtful that the community would be committed to fostering a relationship between a child abuser and his or her spouse.\textsuperscript{399} By abusing defenseless children, defendants have forfeited the right to enjoy the comfort obtained by confiding one's secrets in a loved one.

\textsuperscript{390} See supra notes 165–69 and accompanying text (discussing courts' application of Wigmore's utilitarian balancing test).

\textsuperscript{391} These two factors mandate that the relationship between the defendant and the witness be one that the community believes "ought to be sedulously fostered" and that the injury caused to the relationship by the disclosure of the communication at trial be greater than the benefit gained by the admission of the evidence. 8 Wigmore, supra note 97, § 2285, at 527; see also supra note 167 and accompanying text.

\textsuperscript{392} See supra note 167.

\textsuperscript{393} See supra note 167 and accompanying text.

\textsuperscript{394} See supra notes 358–59 and accompanying text.

\textsuperscript{395} See supra note 359 and accompanying text.

\textsuperscript{396} See supra note 359 and accompanying text.

\textsuperscript{397} See supra note 246.

\textsuperscript{398} See 8 Wigmore, supra note 97, § 2285, at 527.

\textsuperscript{399} See, e.g., supra note 350 and accompanying text (discussing a New Jersey statute reflecting the legislature's willingness to protect children from abuse, even at the expense of the defendant's right to privacy).
Finally, Wigmore proposed that a court should recognize a privilege only when "[t]he injury that would inure to the relation by the disclosure of the communications [is] greater than the benefit thereby gained for the correct disposal of litigation."\(^{400}\) As the next section discusses, the marital privileges in child abuse cases fail to satisfy this factor because the benefit of admitting the testimony—increasing the likelihood of a guilty defendant's conviction—is much greater than the injury to the couple's relationship.

2. Balancing the Benefits of Allowing the Privilege with the Need To Admit a Witness-Spouse's Testimony

The many reasons for a broadened exception have been outlined in the cases described above,\(^ {401}\) but boil down to this: the importance of admitting a spouse's evidence overpowers the competing public policies underlying the marital privileges. As discussed next, the admission of a witness-spouse's testimony is an important societal interest.

The need to effect justice for child victims of abuse is critical. One cannot understate the abhorrent nature of child abuse.\(^ {402}\) Not only is it a painful and frightening experience during childhood, a time in which all children deserve safe, loving, and carefree surroundings, but its ramifications also last long into adulthood.\(^ {403}\) If protecting individual children from the consequences of abuse is not reason enough to curb the reach of the marital privileges, the ripple effect of that abuse on the rest of society must be.

In addition, there is an especially critical need for courts to admit all available evidence in child abuse trials. Prosecutors of child abusers often possess little evidence against the defendant because, typically, there are few witnesses to instances of child abuse.\(^ {404}\) Because it is so often an intrahousehold crime,\(^ {405}\) the offender, the victim, and the person in whom the offender confides—the spouse—will be the only parties with any knowledge of the crime. Moreover, the unique nature of the relationship between abuser and victim creates a situation in which the child feels powerless to reveal the abuse or testify about it.\(^ {406}\) When a defendant's spouse knows of the crime, therefore, courts must admit the spouse's testimony, whether voluntary or compelled.

Finally, this section considers the importance of the public policies underlying the marital privileges: preventing the dissolution of the

\(^{400}.\) See 8 Wigmore, supra note 97, § 2285, at 527.
\(^{401}.\) See supra Part II.B.
\(^{402}.\) See supra notes 352–55 and accompanying text.
\(^{403}.\) See supra notes 352–55 and accompanying text.
\(^{404}.\) See supra notes 200–03 and accompanying text.
\(^{405}.\) See supra notes 200–03 and accompanying text.
\(^{406}.\) See supra note 323 and accompanying text.
defendant’s marriage\textsuperscript{407} and ensuring the privacy of marital communications. \textsuperscript{408} Turning to the second part of the balancing test, the public policy supporting the marital privileges is relatively weak compared to the harm in excluding the witness-spouse’s testimony. When courts compare the benefits described above to determine the applicability of a marital privilege, the value in admitting a witness-spouse’s testimony outweighs that of protecting the defendant’s marriage. First, although marriage is a respected institution important for the personal fulfillment of U.S. citizens,\textsuperscript{409} society has a stronger interest in the administration of justice in child abuse prosecutions. Although it may strike some as immoral to compel an unwilling witness to participate in the downfall of his or her spouse,\textsuperscript{410} a possible result of this Note’s proposed exception, this injustice nevertheless pales in comparison to the immorality of the witness’s desired alternative: concealing one’s knowledge of the abuse of an innocent child. The same concept inheres when comparing the value of privacy, which underlies the marital communications privilege,\textsuperscript{411} with the value of punishing child abusers. Society may value an individual’s right to privacy,\textsuperscript{412} but not at the high cost of a loss of crucial evidence.

This Note’s proposed child abuse exception is quite broad, which may trouble courts concerned about the waning utility of the marital privileges. The danger of the child abuse exception encroaching upon the marital privileges, however, is minimal. First, while the child abuse exception suggested here is expansive, it is not novel.\textsuperscript{413} Both federal and state courts have employed this form of the exception without unduly impinging upon the marital privileges.\textsuperscript{414} Second, the instances in which the exception will apply are limited. Child abuse prosecutions are heard in federal courts only when the defendant has violated a federal statute in the course of the abuse. Such statutes are limited in both number and applicability.\textsuperscript{415} This is illustrated by the fact that not every circuit has needed to create a child abuse exception.\textsuperscript{416} Finally, even if all federal courts were to adopt the proposed exception, the additional cases in which the child abuse exception

\textsuperscript{407} This is the most commonly cited rationale for the adverse spousal testimony privilege. See supra note 108 and accompanying text.

\textsuperscript{408} This is the purpose of the marital communications privilege. See supra notes 147–51 and accompanying text.

\textsuperscript{409} See supra notes 170–72 and accompanying text.

\textsuperscript{410} See supra note 174 and accompanying text.

\textsuperscript{411} See supra notes 146–51, 173 and accompanying text.

\textsuperscript{412} See supra notes 175–76 and accompanying text.

\textsuperscript{413} See supra Part II.B.

\textsuperscript{414} See, e.g., United States v. Martinez, 44 F. Supp. 2d 835, 837 (W.D. Tex. 1999) (adopting a child abuse exception applying in cases of abuse any minor child without suggesting any willingness to abrogate the marital privileges in other types of cases); see also supra notes 325–33 and accompanying text.

\textsuperscript{415} See 18 U.S.C. § 2241–2245 (2006) (delineating federal statutes regarding sexual abuse); id. § 2251–2260A (describing federal prohibitions related to the sexual exploitation of children, including all offenses related to child pornography).

\textsuperscript{416} See note 312 and accompanying text (stating that only four circuits have heard cases involving the child abuse exception).
would apply, though important, are few. For instance, this Note’s exception would apply if the defendant abused a niece or nephew, a neighbor’s child, or a child whom the defendant supervised in a daycare facility. Beyond these types of situations, there are few instances in which the defendant’s spouse would know about a defendant’s abuse of a child.

Lastly, as discussed in the previous section, many have doubted that the marital privileges have succeeded in accomplishing their dual policy goals. If the exclusion of a witness-spouse’s testimony will have no positive societal effect, the courts have an additional reason to admit a witness-spouse’s critical evidence of a child’s abuse.

CONCLUSION

All federal courts faced with defendants or witnesses who invoke a marital privilege to preclude spousal testimony related to the abuse of any child should adopt the expansive child abuse exception articulated in this Note. The current system of haphazard expansion and constriction of child abuse exceptions could result in a prosecutor’s failure to secure a conviction for a dangerous defendant who has committed abhorrent acts of abuse. A child abuse exception that eradicates the marital privileges in all cases of child abuse is necessary for the benefits it provides to both individual victims and to society at large by bringing a criminal to justice. When children have been abused, society has failed them once. Courts should refuse to fail them again.

417. See supra notes 394–96 and accompanying text.