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Kimberly A. Connor

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Notes

A CRITIQUE OF THE MARITAL PRIVILEGES: AN EXAMINATION OF THE MARITAL PRIVILEGES IN THE UNITED STATES MILITARY THROUGH THE STATE AND FEDERAL APPROACHES TO THE MARITAL PRIVILEGES

I. INTRODUCTION

Michelle, a developmentally challenged teen-ager who adored her older sister Kathy McCollum, begged and pleaded with her mother until she agreed to allow her to spend the summer with Kathy.¹ During her sister's visit, Kathy ensured that Michelle bathed herself, ate properly, performed basic household chores, and that Michelle never left the yard or house alone. One night that summer, Kathy woke up to find that her husband was not in bed. She found him in the living room, but what she saw shocked and dismayed her. Michelle, her fourteen-year-old sister, was lying on the floor with her nightgown above her waist, rubbing her stomach. Her husband, Terry, a Staff Sergeant in the United States Air Force, was sitting on the couch in his underwear watching Michelle.

The next morning, Kathy approached Michelle and asked her if she had had sex with anyone since she came to visit. Michelle, scared and nervous, answered "No" until Kathy explained to her that she was not in any trouble. Michelle then reluctantly admitted that "Yes," she had had sex with someone. She identified the person as Terry and explained, "I

The hypothetical situation presented is based on the facts surrounding the unreported court-martial of *United States v. McCollum*. Because Michelle was a minor when this incident occurred, her name and her sister's first name have been changed to protect Michelle's true identity. Staff Sergeant McCollum pleaded not guilty to two specifications of rape and one specification of indecent acts with a minor. Denise Spaulding, SJ Supply NCO Convicted of Rape Charge, Others, SEYMOUR JOHNSON WRIGHT TIMES, Aug. 4, 2000, at 8. Staff Sergeant McCollum was found guilty of raping a child, engaging in unlawful carnal knowledge of a child, and indecent acts with a child. *Id.* He received a sentence of 18 years confinement at Fort Leavenworth, Kansas, a reduction in grade to airman basic, and a dishonorable discharge. *Id.* Additionally, he had to forfeit all his pay and allowances. *Id.*

didn't want to, but he made me."² Kathy then approached her husband with the allegation that he had raped her sister.³ Terry angrily denied the accusation, until Kathy informed him that Michelle had already told her the truth about what had happened. Kathy demanded to know how he could have done this to Michelle and to their families. His only

² Michelle's situation was not an isolated case of abuse, nor was her failure to report the incident unique. In the United States alone, a child is sexually assaulted every two minutes and for every child who reports the abuse, nine do not. Monique K. Cirelli, et al., Expert Testimony in Child Sexual Abuse Cases: Helpful or Prejudicial? People v. Beckley, 8 T.M. COOLEY L. REV. 425, 425 (1991). Girls, as compared to boys, have a greater risk of being sexually abused, particularly by family members, while boys have a greater risk of being sexually abused by non-family members. Kathryn Kuehnle, et al., Child Protection Evaluations: The Forensic Stepchild, 38 FAM. & CONCILIATION CTS. REV. 368, 377-78 (2000). Furthermore, children who do not live with their biological mother are three times more likely to be sexually abused than those children living with their biological mother. Id. at 379. In 1997, there were over three million cases of child abuse reported to Child Protective Services nationwide. See Jillian Grossman, The Fourth Amendment: Relaxing the Rule in Child Abuse Investigations, 27 FORDHAM URB. L.J. 1303, 1303 (2000). Of this number, Child Protective Services confirmed 1,045,000 reports of child abuse with 22% being physical abuse, 8% sexual abuse, 54% neglect, 4% emotional abuse, and 12% other forms of maltreatment. Id. at 1303 n.2. Child molestation, however, is one of the nation's most under-reported crimes. Manyinder Gill, Protecting the Abused Child: It is Time to Reevaluate Judicial Preference for Preserving Parental Custody Rights Over the Rights of the Child to be Free from Physical Abuse and Sexual Exploitation, 18 J. JUV. L. 67, 70 (1997). Several factors combine to make it difficult to prove child sexual abuse. See Jeanine Lewis, Chapter 417: The Welfare of Children--A Higher Priority Than Family Reunification, 31 McGeorge L. Rev. 561, 563 (2000). The abuse generally occurs in private, by a trusted relative, and physical evidence is rare thus, leaving most courts with the child's word against that of the defendant. Id. In addition, the child is then forced to testify against that relative in a formal and unfamiliar courtroom. Id. Even the Supreme Court has recognized that "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except the victim." Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987); see also Morgan v. Foretich, 846 F.2d 941, 943 (4th Cir. 1988) (noting that "in two-thirds of child abuse cases, the incident is never even reported").

³ Michelle's molestation by a family member is also not unusual. See Lewis, supra note 2, at 563 (indicating most of the perpetrators of child abuse are either the child's parents or some other relative); Veronica Serrato, Note, Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses, 68 B.U. L. REV. 155, 158 (1988) (describing the vast majority of sexual abuse cases as involving intrafamilial abusers who are in trusted positions, such as fathers, stepfathers, mothers' boyfriends, or other adults with easy access to the child's home). After the abuse, an increasing number of children are moving in with relatives, godparents, and other individuals who are close to the children's parents. Howard A. Davidson, Child Protection Policy and Practice at Century's End, 33 FAM. L.Q. 765, 778 (1999). It is estimated that in the twenty-first century, the majority of children placed by child welfare agencies will reside in these "kinship care" homes, rather than foster homes. Id. Presently, there are over half a million children in foster care. Cristine H. Kim, Note, Pulting Reason Back Into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases, 1999 U. Ill. L. Rev. 287, 288.

response was "I don't know." Then, when Kathy expressed her concern that Michelle could be pregnant, Terry responded "No, she can't be pregnant because I didn't ejaculate."

The McCollums divorced several years later, although for reasons unrelated to Terry's behavior toward Michelle. After the divorce was finalized, while the Air Force was investigating a separate rape charge against Staff Sergeant McCollum, the government discovered that he also might have raped Michelle.⁴ When the Air Force brought charges against him under the Uniform Code of Military Justice ("UCMJ"), Kathy was willing to testify about her conversations with her husband.⁵ Staff Sergeant McCollum objected to her testimony on grounds that it violated Military Rule of Evidence 504(c)(2)(A), which only allows a spouse to testify about confidential marital communications when "one spouse is charged with a crime against the person or property of the other spouse or a child of either."⁶ Because Michelle was Kathy's sister, Michelle was not within the scope of the exceptions to the privilege, and therefore Kathy was not allowed to testify as to any of the confidential communications between herself and her husband.⁷ The prosecution,

^{*} The rape charges against Staff Sergeant McCollum were not an isolated incident in the military. See Alfred F. Arguilla, Crime in the Home, ARMY LAW., Apr. 1988, at 3, 3 n.5. The number of courts-martial involving child sexual offenders has dramatically increased in recent years. Id. In 1974, only one inmate at the United States Disciplinary Barracks, at Fort Leavenworth, Kansas, was incarcerated for child sexual abuse. Id. However, in December 1987, there were 255 inmates who had been convicted of child sexual abuse. Id. Of these offenses, approximately 35% were directed at children outside the family, unrelated by either blood or marriage to the offender. Id. Servicemembers are rarely tried by court-martial for child abuse that does not also include sexual abuse. Id. at 6-7. The primary justification for this decision is that these are the most serious offenses in "terms of abhorrence to society and the maximum possible confinement." Id. at 7. Courts-martial statistics reveal that most victims of child sexual abuse are children who are at least twelve years old because older children tend to be more likely to report the abuse and make better witnesses. Id. at 8.

⁵ The Uniform Code of Military Justice ("UCMJ") is located at 10 U.S.C. §§ 801-946 (1994). "The Uniform Code of Military Justice establishes the basic structure of the military justice system." Gregory E. Maggs, Judicial Review of the Manual for Courts-Martial, 160 MIL. L. REV. 96, 96 (1999). Specifically, it delineates the requirements for convening a court-martial, establishes the jurisdiction of courts-martial, and identifies the offenses that a court-martial may punish. *Id.*

⁶ The focus of this Note is on the applicability of Military Rule of Evidence 504(c)(2)(A) ("MRE") to non-traditional families where the child residing with the accused is neither a child of the accused nor of the accused's spouse.

⁷ Here again, Michelle's situation is not an isolated incident. Between July 1, 1986, and June 30, 1987, there were 532 substantiated cases of intrafamilial child sexual abuse in the

however, argued that the exception to the privilege should be extended to include situations where a spouse acts as the guardian or in loco parentis⁸ over a child.⁹ The military judge rejected this argument and consequently found many of Staff Sergeant McCollum's statements to his wife inadmissible.¹⁰

This Note examines the disparity in the military justice system, which allows the testimony of one spouse when the other is charged with an offense against "a child of either [spouse]," but not when the servicemember is charged with the same crime against other children who may be living in the same home. Part II addresses the basic principles of the UCMJ, including the general procedures for convening a court-martial, and outlines the basic differences between the Military Rules of Evidence ("MRE") and the Federal Rules of Evidence. It also

United States military. Arguilla, supra note 4, at app. A. Intrafamilial crimes are those involving abuse committed by an offender against his or her child or stepchild. *Id.* During this same period, there were 2832 substantiated cases of extrafamilial child sexual abuse. *Id.* Extrafamilial crimes generally involve a victim other than the offender's child or stepchild. *Id.*

- In loco parentis is defined as "acting as a temporary guardian of a child." BLACK'S LAW DICTIONARY 791 (7th ed. 1999).
- ⁹ Privileges are justified on various grounds, including protecting the family status. See discussion infra Part II.B.1. While courts have not addressed what constitutes a family for this purpose, this issue has been addressed in other contexts. See, e.g., Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 499, 502 (1977) (finding unconstitutional a zoning ordinance that defined as unrelated a grandmother and her two grandsons, who were first cousins, because the ordinance infringed the rights of the extended family). However, in Troxel v. Granville, 530 U.S. 57, 63 (2000), the Supreme Court did recognize that "[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household . . . [u]nderstandably, in . . . single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing." Id. at 63-64.
- ¹⁰ The military judge found some of Staff Sergeant McCollum's statements admissible because she determined that such statements were not confidential since the information was meant to be transmitted to a doctor.
- ¹¹ In this Note, servicemember refers to any person who is subject to the UCMJ. This primarily includes personnel on active duty, reservists while on active or inactive duty training, and retirees who are entitled to pay. See 10 U.S.C. § 802 (1994) (listing which people are subject to the UCMJ). As of 1989, there were 3,500,000 individuals subject to the UCMJ. See Military Justice and Article III, 103 HARV. L. REV. 1909, 1909 (1990) [hereinafter Military Justice].
- ¹² See discussion infra Part II.A. The MRE may be found in the MANUAL FOR COURTS-MARTIAL: UNITED STATES (2000) [hereinafter MCM]. The Court of Military Appeals has described the MCM as the military lawyer's "Bible" because it would be virtually impossible to conduct a court-martial without referring to the MCM. Maggs, supra note 5, at 97; see also United States v. Dunnahoe, 21 C.M.R. 67, 75 (C.M.A. 1956) (referring to the

provides a brief history of the marital privileges, describes the requirements for the adverse testimonial privilege or the confidential communications privilege, and examines the federal and military case law describing the exception to the marital privileges when the offense is against a child.¹³ In Part III, this Note describes the competing state approaches for such an exception, asserts the need for an amendment to MRE 504(c)(2)(A) so that a child under the custody or control of either spouse is covered by the exception, and identifies the justifications for amending MRE 504(c)(2)(A).¹⁴ Part IV then provides a proposed amendment to MRE 504(c)(2)(A), explains the meaning of custody or

MCM as "our Bible"); United States v. Drain, 16 C.M.R. 220, 222 (C.M.A. 1954) (describing the MCM as "the military lawyers' vade mecum-his very Bible"). There have, however, been over one hundred reported instances where the defense or government counsel requested that a court invalidate or ignore MCM provisions. Maggs, supra note 5, at 98. Because the rules in the MCM may determine the outcome of a criminal trial or the sentence length, the judiciary gives such challenges serious attention. Id. Most of these challenges are asserted by the accused who does not want a rule of evidence or procedure to apply to that case, and therefore, may look for grounds for invalidating that provision. ld. at 101. Government counsel will rarely contest the validity of MCM provisions. Id. at 102. Even though individuals may not favor all of the evidentiary rules or procedures, they will not contest the provision because the MCM states official policy. Id. Additionally, government attorneys rarely have authority to question such requirements, even if such requirements make conviction more difficult. Id. Nothing, however, in the UCMJ or any other statute identifies the grounds for invalidating provisions in the MCM. Id. at 103. The Joint Services Committee on Military Justice ("JSC") is responsible for preparing and evaluating proposed amendments to the MCM on an annual basis. DEPARTMENT OF DEFENSE, DIRECTIVE No. 5500.17(3) (1996). The JSC is also responsible for ensuring that the MCM "applies the principles of law and the rules of evidence generally recognized in the trial of criminal cases in United States district court to the extent practicable and to the extent that such principles and rules are not contrary to, or inconsistent with, the UCMJ." ld. Any interested person is allowed to submit proposed changes to the UCMJ or the MCM to the JSC. Military Justice Fact Sheets, at http://sja.hqmc.usmc.mil/JAM/MJFACTSHTS. htm (last visited Nov. 21, 2001). The JSC was responsible for the original codification of the MRE. Frederic I. Lederer, The Military Rules of Evidence: Origins and Judicial Implementation, 130 MIL. L. REV. 5, 9 (1990). In fact, the JSC was originally established to keep the MCM current with developments in the law. Id. The JSC evaluates proposals for change throughout the year and forwards any proposals to the Department of Defense General Counsel's Office. Id. Once the JSC has completed its annual review, notice of the proposed changes are published in the Federal Register. Id. at 12. After the public notice and comment period, the recommended proposals and modifications are reviewed. Id. Based on that information, the JSC prepares a draft Executive Order for the President. Id.; see also discussion infra Part II.A.

¹³ See discussion infra Parts II.B-C. For purposes of this Note, it is assumed that the requirements of the confidential communications privileges were established.

¹⁴ See discussion infra Part III.

control, and describes how such an amendment would affect children like Michelle. 15

II. BACKGROUND

Servicemembers charged with violating the UCMJ are prosecuted by the United States of America in a court-martial. These criminal proceedings are governed by the MRE. The MRE recognize two different marital privileges: the adverse testimonial privilege and the confidential communications privilege. Before either privilege will apply, however, certain requirements must be established. This Part explains the basic procedures and practices of the military justice system, describes the history, justifications, and requirements of the adverse testimonial and confidential communications privileges, and examines federal and military case law describing the exception to the marital privileges for offenses involving children.

A. The Military Criminal Justice System

The military justice system is a unique system with crimes, procedures, and sanctions that differ from the civilian criminal justice system.²⁰ The military justice system was designed with the dual

¹⁵ See discussion infra Part IV.

¹⁶ See BLACK'S LAW DICTIONARY, supra note 8, at 362 (defining a court-martial as an "ad hoc military court, convened under military authority, to try and punish those who violate the Uniform Code of Military Justice, particularly members of the armed forces").

¹⁷ Lederer, supra note 12, at 39.

¹⁸ See discussion infra Part II.B.

¹⁹ See infra notes 99-106, 122-30 and accompanying text (describing the requirements for each privilege).

²⁰ DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1-1, at 2 (5th ed. 1999). The separate military justice system has been justified on the ground that the worldwide deployment of large numbers of military members with unique disciplinary requirements mandates a flexible, separate system that is capable of operating during peace or conflict. See id. Additional justifications include the need for the instant mobility of servicemembers, the need for a speedy trial in order to avoid any loss of witnesses due to combat needs and effects, and the peculiar nature of military life. 1 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 1-20.00, at 3 (1991). Even the Supreme Court has recognized that the "military is, by necessity, a specialized society separate from civilian society . . . [the Court has] also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history." Parker v. Levy, 417 U.S. 733, 743 (1974); see also Andrew M. Ferris, Comment, Military Justice: Removing the Probability of Unfairness, 63 U. CIN. L. REV. 439, 443-53 (1994) (tracing the evolution of the military justice system).

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purposes of promoting justice and establishing discipline.21 Although there are significant differences between the military and civilian criminal systems, procedurally the military system functions in a fashion similar to civilian criminal courts.22

The military justice system has jurisdiction to prosecute crimes committed by servicemembers.23 This jurisdiction extends to crimes

²¹ See MCM, supra note 12, at I-1. To be precise, "[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." Id. But, "[wlithin the armed forces, 'discipline' is not a pejorative term." 1 GILLIGAN & LEDERER, supra note 20, §1-30.00 at 5. "[Discipline] means an attitude of respect for authority developed by precept and by training." Id. These goals are not always harmonious because traditionally those most interested in discipline are likely to emphasize the prompt obedience of orders, while those most interested in justice will focus on accuracy and fairness in punishing individual offenders. Id. The Supreme Court has recognized that "[t]he need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice" as too obvious to require extensive discussion because "no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting". Chappell v. Wallace, 462 U.S. 296, 300 (1983); see also John S. Cooke, 156 MIL. L. REV. 1, 5-7 (1998) (discussing the meaning and importance of discipline in the military).

²² See 1 GILLIGAN & LEDERER, supra note 20, § 1-20.00, at 2 (characterizing the military justice system as "justice based" with the major procedural elements paralleling civilian law and meeting substantive due process requirements). Congress enacted the UCMJ as a result of substantial public and legislative displeasure with the unjustness of the military criminal justice system during World War II. Id. at 15-16. The military criminal justice system lacks a significant noncriminal component, contains unique military offenses, applies to all offenses committed by servicemembers, maintains worldwide jurisdiction to ensure the easy transfer of personnel, and is generally uniform throughout the armed forces. Id. at 2; see also Jacob Hagopian, The Uniform Code of Military Justice in Transition, ARMY LAW, July, 2000, at 1, 1-3 (describing the differences between the current UCMJ and the WWII provisions).

²³ See 1 GILLIGAN & LEDERER, supra note 20, § 2-22.10, at 45. The UCMJ establishes the various types of offenses: the punitive articles contain offenses common to civilian life such as homicide, burglary, assault, and rape; as well as offenses unique to military service such as desertion, absence without leave, failure to obey orders or regulations; and combat offenses such as compelling surrender, misbehavior before the enemy, aiding the enemy, and misconduct as a prisoner. The text of these offenses is found in Articles 77-134 of the UCMJ. 10 U.S.C. §§ 877-934 (1994 & Supp. 1999). Additional punishable offenses include "conduct unbecoming an officer and a gentleman" and the General Code which includes all those acts not specifically listed in the other punitive articles, but that are to the "prejudice of good order and discipline in the armed forces, and all conduct of a nature to bring discredit upon the armed forces." 10 U.S.C. §§ 933-934. The text of conduct unbecoming of an officer and a gentleman is found in Article 133 of the UCMJ, while the General Article is found in Article 134. 10 U.S.C. §§ 933-34. Article 133 includes conduct

committed during peacetime, on leave, off the premises of a military installation, in civilian apparel, and those against civilians.²⁴ A servicemember charged with a violation of the UCMJ is tried by a court-martial.²⁵ This procedure is initiated by an investigation into the charges and completed by a determination of guilt or innocence.²⁶

When a commanding officer is informed that a servicemember under his or her command is alleged to have violated a provision of the UCMJ, the commander must either personally make a preliminary inquiry into the suspected charges, or ensure that such an inquiry occurs.²⁷ The commander then decides whether to court-martial the servicemember or take some other remedial action.²⁸ If the commander decides to court-

punishable by other punitive provisions, so long as those acts also constitute conduct unbecoming of an officer and a gentleman. See SCHLUETER, supra note 20, § 2-9(C)(3), at 105. The General Code includes, but is not limited to, assault, adultery, cohabitation, fraternization, indecent acts, and prostitution. Id.; see also United States v. Woods, 28 M.J. 318, 319-20 (C.M.A. 1989) (finding a violation of Article 134 when a servicemember engaged in unsafe sexual intercourse). Jurisdiction over nonmilitary crimes is concurrent with state and federal courts, so a military installation will generally have an agreement with the local civilian authorities concerning the investigation and prosecution of such crimes by servicemembers. Military Justice, supra note 11, at 1910 n.7.

- ²⁴ Military Justice, supra note 11, at 1910; see also Solorio v. United States, 483 U.S. 435, 449-51 (1987) (holding a court-martial was properly convened to try a servicemember who was a member of the armed forces at the time the offense was charged, even though the offense was not service related).
- ²⁵ See supra note 16. There are three tiers of courts in the military justice system. Ferris, supra note 20, at 452-53. The highest court is the Court of Military Appeals which is composed of five civilian judges, who serve fifteen-year terms after being appointed by the President and approved by the Senate. Id. Decisions of the Court of Military Appeals may be reviewed by the Supreme Court, if the Supreme Court grants certiorari. Id. at 455. The Court of Military Appeals reviews cases from the four Courts of Military Review (Army, Navy-Marine Corps, Coast Guard, and Air Force). Id. at 453. These courts are responsible for reviewing the decisions of the general, special, and summary courts-martial. Id.; see also infra note 28 (describing the various types of courts-martial).
- 26 See RULES FOR COURTS-MARTIAL 303 ("RCM") in the MCM at II-19, supra note 12.
- Id. Although anyone subject to the UCMJ may prefer charges, the accused's immediate commanding officer usually informally investigates the alleged violation of the UCMJ. See STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL, at xiii (4th ed. 1997) [hereinafter MILITARY RULES]; see also 10 U.S.C. § 830(a)(1-2) (1994) (describing the procedure for preferral). The commander will usually obtain legal advice from a judge advocate to ensure that the case is strong enough to support a conviction. SCHLUETER, supra note 20, §1-7 at 35. The commander does not want acquitted servicemembers to return to the unit and claim "victory" over the commander. Id.
- ²⁸ See 1 GILLIGAN & LEDERER, supra note 20, §1-46.00 at 18; SCHLUETER, supra note 20, §1-7 at 35. Non-court-martial options include administratively discharging the servicemember, recommending reassignment, extra training, or nonjudicial punishment under Article 15 of

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the UCMJ. See 10 U.S.C. § 815 (1994); 1 GILLIGAN & LEDERER, supra note 20, §1-46.00, at 18. Article 15 of the UCMI establishes that "any commanding officer may, in addition to or in lieu of admonition or reprimand, impose . . . disciplinary punishments for minor offenses without the intervention of a court-martial." 10 U.S.C. § 815(b). If a servicemember demands a court-martial in lieu of Article 15 punishment prior to the imposition of the punishment, the punishment may not be imposed and the servicemember must be courtmartialed. 10 U.S.C. § 815(a). If the commander decides to convene, or order, a courtmartial, the court-martial is only convened to hear a single case. SCHLUETER, supra note 20, \$1-7, at 35. A court-martial is not part of the federal judiciary, but is an Article I court, and is therefore not subject to direct judicial review by the federal judiciary. Id. Courts-martial are courts of criminal jurisdiction, and their findings are binding on other federal courts. ld. There are three different types of courts-martial with limitations as to who may convene each type and the punishment that may be imposed. See generally 10 U.S.C. §§ 822-824 (1994) (describing who has the power to convene general courts-martial, special courts-martial, and summary courts-martial). A summary court-martial is limited in scope to non-capital offenses and the maximum punishment that may be imposed is confinement for one month, hard labor without confinement for forty-five days, restriction to specified limits for two months, or forfeiture of two-thirds pay for one month. 10 U.S.C. § 820 (1994). In addition, a servicemember may not be subject to a summary court-martial without his or her permission. 10 U.S.C. § 820. If a servicemember objects to being tried by a summary court-martial that servicemember may be tried by a special or general court-martial. 10 The summary court-martial only has jurisdiction over enlisted servicemembers. Michael H. Gilbert, Summary Courts-Martial: Rediscovering the Spumoni of Military Justice, 39 A.F. L. REV. 119, 122 (1996). The summary court-martial is particularly useful when a servicemember "needs to be taught a swift lesson that will serve as a message to others about to fall off the precipice of good order and discipline." ld. A special court-martial may impose punishment for non-capital offenses by any servicemember; however, punishment is limited to confinement for one year, hard labor without confinement for three months, forfeiture of two-thirds pay per month, or forfeiture of pay for one year, and a bad-conduct discharge. 10 U.S.C. § 819 (1994). The punishment to be imposed on anyone subject to a general court-martial is any punishment not otherwise specifically forbidden, including the death penalty when specifically authorized by the crime. 10 U.S.C. § 818 (1994). Before a general court-martial may be convened, a pre-trial investigation, called an Article 32 hearing, must be conducted, and a legal opinion as to the disposition of the charges must be given to the convening authority. See 10 U.S.C. § 832 (1994). This hearing is meant to guarantee the servicemember is not tried on baseless charges. Larry A. Gaydos, A Comprehensive Guide to the Military Pretrial Investigation, 111 MIL. L. REV. 49, 50 (1986). The Article 32 hearing is to be held by an impartial investigating officer who is then disqualified from subsequently serving as trial counsel, military judge, or member of the panel on that case. Id. at 59, 65. The accused is entitled to be represented by counsel at an Article 32 hearing. Id. at 66. The MCM specifically disqualifies the accuser from being the investigating officer. Id. at 60; see also RCM 405(d)(1) in the MCM, supra note 12, at II-34. The general courts-martial procedure requires free representation by a qualified attorney at all trial and appellate proceedings, automatic appeal at no cost, and full disclosure of all relevant evidence at all stages of the proceedings. See United States v. Fluellen, 40 M.J. 96, 98 (C.M.A. 1994) (guaranteeing the accused effective assistance of counsel at pretrial, trial and post-trial proceedings); Hagopian, supra note 22, at 3. The Sixth Amendment right to counsel only applies to general and special courts-martial, not to summary courts-martial. Maggs, supra note 5, at 153; see also 10 U.S.C. § 827(a)(1) (1994)

martial the servicemember, a military judge will typically preside over the trial.²⁹ Military trial counsel will prosecute the case and the accused will be represented by either military defense counsel, at no expense to the accused, or by civilian counsel at the accused's expense.³⁰

(specifying that "[t]rial counsel and defense counsel shall be detailed for each general and special court-martial").

29 See 10 U.S.C. § 826 (1994); Military Justice, supra note 11, at 1911. The military judge is the equivalent of a United States district court judge. Ferris, supra note 20, at 455. Military judges are selected from a pool of eligible military lawyers. Id. at 482. In non-capital cases, the defendant may waive a hearing before a jury and be tried by military judge alone. Hagopian, supra note 22, at 3. However, this request must be approved by the military judge. Id. The servicemember does not have a Sixth Amendment right to a jury trial. Maggs, supra note 5, at 150-51; see also United States v. Guilford, 8 M.J. 598, 601 (A. Ct. Crim. App. 1979) (stating "the right to a trial by jury as contemplated by the Sixth Amendment does not apply to military trials of members of the armed forces in active service"). But under the Sixth Amendment, both the court-martial and the Article 32 hearing are open to the public. Id.; see also ABC, Inc. v. Powell, 47 M.J. 363, 365 (C.A.A.F. 1997) (finding the Article 32 hearing open to the public and press "unless future compelling circumstances" dictate a different result); United States v. Hershey, 20 M.J. 433, 435 (C.M.A. 1985) (finding the Sixth Amendment right to a public trial applicable to servicemembers). The jury is a panel of servicemembers, who are selected by the convening authority. See 10 U.S.C. § 825 (1994); Military Justice, supra note 11, at 1911. This method of selecting the panel has been heavily criticized. See, e.g., Guy P. Glazier, He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three-Selection of Military Juries by the Sovereign: Impediment to Military Justice, 157 MIL. L. REV. 1, 66-106 (1998) (criticizing the panel selection as breeding unlawful command influence and as unconstitutional for failing to select a panel representing a fair-cross section of servicemembers). The panel must consist of at least five servicemembers senior or equal in rank to the accused. Military Justice, supra note 11, at 1911. All active duty servicemembers are eligible to serve on a panel; however, only commissioned officers are authorized to serve on a panel when the accused is a commissioned officer. Stephen A. Lamb, The Court-Martial Panel Selection Process: A Critical Analysis, 137 MIL. L. REV. 103, 126 (1992). If the accused is enlisted, he or she may request a panel composed of at least one-third enlisted servicemembers, so long as there are no military circumstances that prevent enlisted members from serving. Id. However, no panel member will be junior in rank to the accused if the situation can be avoided. Id. The panel's purpose is to determine not only the verdict, but also the sentence. See RCM 1006 in the MCM, supra note 12, at II-134; Military Justice, supra note 11, at 1911. A conviction only requires the concurrence of two-thirds of the members, except in cases where the law mandates the death penalty where a unanimous verdict is then required to convict. See 10 U.S.C. §§ 852(a)(1)-(3) (1994); see also United States v. Gay, 16 M.J. 586, 600 (A.F. Ct. Crim. App. 1983) (finding a vote of two-thirds of the panel for the death penalty was unconstitutional). Simply because a servicemember may be sentenced to death by a panel containing less than twelve members does not make the military death penalty system unconstitutional. See Dwight H. Sullivan, Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty, 158 MIL. L. REV. 1 (1998).

30 See 10 U.S.C. § 838 (1994); Military Justice, supra note 11, at 1911. The accused may plead guilty with the military judge's approval. See Terry L. Elling, Guilty Plea Inquiries: Do We

While the Federal Rules of Evidence govern civilian cases, a court-martial follows the MRE.³¹ Article 36 of the UCMJ gives the President the power to create regulations governing a court-martial.³² This power, however, is subject to the limitation that the President must, as far as practicable, apply the evidentiary rules that apply to criminal trials in the district courts to courts-martial.³³ The MRE are, therefore, substantially the same as the Federal Rules of Evidence, with a major distinction being that the MRE adopted many of the proposed specific privileges which Congress rejected when it adopted the Federal Rules of Evidence.³⁴

Important in the context of this Note are the differences in the spousal privileges as adopted by the military.³⁵ This Note will focus on MRE 504(c)(2)(A), which provides:

[there is no adverse testimonial or confidential communications privilege] [i]n proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person

Care Too Much?, 134 MIL. L. REV. 195 (comparing aspects of guilty plea inquires in courts-martial to those in federal district courts).

³¹ See MILITARY RULES, supra note 27, at xi; Lederer, supra note 12, at 5. The MRE not only govern trials by courts-martial but also guide law enforcement personnel and commanders in their daily need to protect the rights of military members. Lederer, supra note 12, at 39. The Federal Rules of Evidence do not govern state court decisions. FED. R. EVID. 101.

³² See 10 U.S.C. § 836 (1994); SCHLUETER, supra note 20, §1-1(B) at 7.

³³ See 10 U.S.C. § 836; SCHLUETER, supra note 20, §1-1(B) at 7. The President shall "as he considers practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 10 U.S.C. § 836.

³⁴ See MILITARY RULES, supra note 27, at xii; Lederer, supra note 12, at 13. The MRE also codify the law of interrogations and confessions, search and seizure, and eyewitness identification. 1 GILLIGAN & LEDERER, supra note 20, §21-21.00 at 872-873; see also infra notes 72-83 and accompanying text (discussing the creation of the Federal Rules of Evidence). One of the goals in creating the MRE was to apply the Federal Rules of Evidence in courts-martial. Lederer, supra note 12, at 10. Colonel Alley, the "father" of the MRE, intended that the codification of the MRE would not only reflect the Federal Rules of Evidence, but also "that all future military evidentiary law echo it as well, unless a valid military reason existed for departing from it." Id. at 6, 13.

³⁵ See Lederer, supra note 12, at 16 (describing the origin of the privilege rules as coming from the 1969 MCM, the unenacted Federal Rules of Evidence dealing with privileges, and also partially from scratch).

committed in the course of committing a crime against the other spouse.³⁶

Under this rule, a servicemember charged with a crime against "a child of either spouse" would be prevented from invoking either the adverse testimonial privilege or the confidential communications privileges.³⁷

B. The Marital Privileges

Privileges apply during all stages of court proceedings, and only the holder of the privilege has the power to assert or waive the privilege.³⁸ A privilege may involve the refusal to testify, the refusal to produce evidence, or the invocation of the right to prevent other people from producing evidence.³⁹ There are two distinct marital privileges: the adverse testimonial privilege that prevents a spouse from being compelled to testify against the other spouse, and the confidential communications privilege that prevents a spouse from testifying about any confidential communications.⁴⁰ Thus, the adverse testimonial privilege is the broader of the two privileges because it prohibits the testimony of any facts by a spouse, even if those facts are not learned through confidential marital communications.⁴¹ However, the adverse testimonial privilege can also be considered more restrictive than the confidential communications privilege as it only applies to adverse testimony by a spouse, while the confidential communications privilege

MIL. R. EVID. 504(c)(2)(A). Also of importance is MRE 501(d) which recognizes both the codified privileges and those "principals of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual." MIL. R. EVID. 501(d). This rule thus allows for the adoption of new privileges as they are adopted by federal district courts. Lederer, supra note 12, at 27.

³⁷ MILITARY RULES, supra note 27, at 655, 657.

³⁸ See 1 MCCORMICK ON EVIDENCE, § 73.1, at 272 (John William Strong ed., 4th ed. 1992); see also Christopher B. Mueller & Lard C. Kirkpatrick, Evidence: Practice Under the Rules, § 5.1, at 399 (1999).

³⁹ GLEN WEISSENBERGER, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY, § 501.3, at 198 (1999).

⁴⁰ MUELLER & KIRKPATRICK, supra note 38, § 5.1, at 399; WEISSENBERGER, supra note 39, § 501.6, at 215.

⁴¹ See 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, § 2334, at 85 (1923) [hereinafter WIGMORE ON ANGLO AMERICAN EVIDENCE]; David M. Lawson, Evidence, 45 Wayne L. Rev. 883, 895 (1999).

may be invoked by a spouse in any proceeding, even when the spouse invoking the privilege is not a party to the proceeding.42

1. The General Role and Justifications of Privileges

Privileges differ from most evidentiary rules because privileges exclude relevant evidence that would aid in the search for truth since society considers the protection of some relationships to be more important than the search for the truth.⁴³ The law of privileges is, therefore, based upon policy considerations that exist independently from the usual evidentiary concerns of the accuracy and reliability of evidence.44 Because privileges limit the admissibility of evidence, the courts or the legislatures must consider the privileges to be necessary to protect some other compelling interest.⁴⁵ As a result, a variety of justifications have been developed to explain the existence of privileges.46 Most evidentiary rules have as their ultimate justification the promotion of the objectives established in the witness oath: "the

⁴² See 5 WIGMORE ON ANGLO AMERICAN EVIDENCE, supra note 41, § 2334, at 85. Professor Wigmore described these two privileges as having "practically nothing in common, either in policy or in rule" and emphasized the need for the complete separation of these privileges. Id.

⁴³ MUELLER & KIRKPATRICK, supra note 38, § 5.1, at 399. Sometimes the extent to which privileges interfere with the fact-finding process is exaggerated because if a communication would not have been made without a privilege, the existence of a privilege does not cause any loss of evidence. 1 MCCORMICK ON EVIDENCE, supra note 38, § 72, at 269. Besides, the refusal to recognize a privilege does not guarantee the disclosure of truth, but possibly invites perjury. Id.

⁴⁴ WEISSENBERGER, supra note 39, § 501.3, at 198. There are a variety of privileges in addition to the spousal privileges which are not addressed in this Note. The goal or purpose of these privileges is encouraging individuals in need of assistance to seek help. Erica Smith-Klocek, A Halachic Perspective on the Parent-Child Privilege, 39 CATH. LAW. 105, 115 (1999). These privileges include the attorney-client privilege, the clergyman-penitent privilege, and the doctor-patient privilege. Id.

⁵ Shonah P. Jefferson, Note, The Statutory Development of the Parent-Child Privilege: Congress Responds to Kenneth Starr's Tactics, 16 GA. St. U. L. REV. 429, 432 (1999); see also 1 MCCORMICK ON EVIDENCE, supra note 38, § 72, at 269. The word privilege is derived from the Latin phrase privata lex which has been defined as "a private law applicable to a small group of persons as their special prerogative, or as a particular and peculiar benefit or advantage enjoyed by a person, company, or class beyond the common advantages of others." See Wendy Meredith Watts, The Parent-Child Privileges: Hardly a New or Revolutionary Concept, 28 WM. & MARY L. REV. 583, 590 (1987).

⁴⁶ Watts, supra note 45, at 590 (referring to society's recognition that protecting privileged relationships is more valuable than the goal of seeking the truth).

truth, the whole truth, and nothing but the truth."⁴⁷ Consequently, privileges are controversial because they inhibit the common law principle that "the public has a right to every man's evidence."⁴⁸

The justification, or rationale, for recognizing most of the non-constitutional privileges is the protection of confidential relationships.⁴⁹ More recently developed justifications include the need for encouraging the free flow of information in certain relationships and protecting the privacy of those relationships.⁵⁰ Such justifications are not without criticism because some scholars argue that such interests are insufficient when balanced against the need to obtain otherwise unobtainable evidence.⁵¹ These justifications have also been criticized because the openness of communications in personal and professional relationships depends more on the level of trust between the participants, than on the

⁴⁷ 1 MCCORMICK ON EVIDENCE, *supra* note 38, § 72, at 269. The exclusionary rules such as the hearsay rule, the opinion rule, and the rule excluding bad character as evidence of the defendant having committed a crime have as their purpose the pursuit of truth. *Id.* This purpose is sought by excluding unreliable, misleading or prejudicial evidence. *Id.*

⁴⁸ Nissa M. Ricafort, Note, Jaffe v. Redmond: The Supreme Court's Dramatic Shift Supports the Recognition of a Federal Parent-Child Privilege, 32 IND. L. REV. 259, 260 (1998).

⁴⁹ WEISSENBERGER, supra note 39, § 501.3, at 199. This justifies the existence of the marital privileges. Id. Professor Wigmore argued that the justifications for marital privileges were created "ex post facto, for rules so simple and so long accepted, could hardly have been believed, but for the recorded utterances." 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, § 2228, at 3037 (1904) [hereinafter WIGMORE ON EVIDENCE]. He further argued that this idea was entertaining because of the "solemn absurdity of explanations which do not explain and of justifications which do not justify, and because of the fantastic spectacle of a fundamental rule of evidence, which never had a good reason for existence, surviving none the less through two centuries." Id. Accordingly, artificial and after the fact justifications were accepted simply because everyone agreed that the privileges existed and that there was good reason for the privileges to exist, but it was not important to name that good reason. Id. According to Professor Wigmore, only two justifications deserve serious consideration. Id. at 3039. The first is the danger of disturbing family peace. Id. He rejected this justification because family peace does not depend on the existence of this privilege. Id. Furthermore, to the extent that a family might be affected, such a result should not stand in the way of justice. ld. The second justification is the "natural repugnance" to reasonable people of forcing a spouse to condemn the other spouse. Id. at 3040. He considered this to be the real reason for maintaining the adverse testimonial privilege, even though based upon sentiment. Id. 30 MUELLER & KIRKPATRICK, supra note 38, § 5.1, at 400; see also WEISSENBERGER, supra note 39, § 501.3, at 199.

⁵¹ 1 MCCORMICK ON EVIDENCE, *supra* note 38, § 86, at 311 (stating "[d]elicacy and decorum while worthy and deserving of protection" are insufficient interests when "there is a need for otherwise unobtainable evidence critical to the ascertainment of significant legal rights").

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existence of some privilege.⁵² However, the existence of other circumstances, such as the level of trust between the parties, does not negate the fact that the communication may be significantly influenced by the existence of a privilege.⁵³

Privileges have also been justified on the grounds that they are necessary to protect privacy, freedom, trust, and honor in personal and professional relationships.⁵⁴ By protecting these relationships and values, the courts and legislatures have indicated that even though the search for truth is of critical importance, other societal interests may be more important.⁵⁵ The history of the marital privileges provides a good example of this balance between conflicting values because the meaning of many of these privileges have not remained constant but have been restricted and modified as a result of changing societal interests.⁵⁶

2. History of the Adverse Testimonial and Confidential Communications Privileges

The two marital privileges have a related history.⁵⁷ The confidential communications privilege developed as a result of increasing limitations or restrictions to the adverse testimonial privilege.⁵⁸ However, it was not until there was a disparate application of the privileges between various jurisdictions that there were developed codified rules in an attempt to create national unity.⁵⁹

⁵² MUELLER & KIRKPATRICK, supra note 38, § 5.1, at 401.

⁵³ Id.; see also In re Grand Jury Investigation, 599 F.2d 1224, 1235 (3d Cir. 1979) (indicating the incentive to confide "is at least partially dependent upon the client's ability to predict that the communication will be held in confidence").

⁵⁴ See MUELLER & KIRKPATRICK, supra note 38, § 5.1, at 400-01. Privileges provide a way to maintain privacy in an increasingly intrusive society. *Id.* § 5.1, at 402. A compelled breach of loyalty would create a sense of betrayal adversely affecting both the person communicating and the person listening to such communications. *Id.*

⁵⁵ Id. at 400. Certain privacy interests are worth protecting, regardless of whether the privilege actually affects the conduct within the protected relationships. See 1 MCCORMICK ON EVIDENCE, supra note 38, § 72, at 270. Thus, the confidential communications privilege is justified on the basis it serves to protect the privacy of certain societally important relationships. Id.

⁵⁶ See generally 3 WIGMORE ON EVIDENCE, supra note 49, § 2227, at 3034-36 (describing the history of the marital privileges).

⁵⁷ Familial Privileges, 98 HARV. L. REV. 1563, 1564-65 (1985).

⁵⁸ Id. at 1565.

⁵⁹ Ricafort, supra note 48, at 262.

The early common law considered a spouse incompetent to testify, either for or against the other spouse.⁶⁰ This result was the product of combining the common law rule disqualifying a party from testifying on his own behalf with the legal fiction that a husband and wife were one person.⁶¹ The spousal disqualification doctrine that regarded a spouse to be incompetent to testify as a witness in any capacity was ingrained in both American and English common-law.⁶² It was not until Funk v. United States⁶³ that the Supreme Court abolished the spousal incompetency doctrine, thus allowing a spouse to testify on behalf of, but not against, the other spouse.⁶⁴ The Court reasoned that because defendants were allowed to testify on their own behalf, there was no longer a good reason to prevent their spouses from doing the same.⁶⁵ Witness disqualification based upon an interest in the proceeding had already been abolished as a result of the modern decisions allowing interested parties to testify, but the courts left the question of credibility

⁶⁰ See 1 MCCORMICK ON EVIDENCE, supra note 38, § 78, at 293; WEISSENBERGER, supra note 39, § 501.6, at 215. The history of the marital privileges goes back to ancient Jewish and Roman law. Watts, supra note 45, at 598. No record seems to exist for the precise time of the origin of the privileges nor the process by which the privilege to choose not to testify against a spouse developed. 3 WIGMORE ON EVIDENCE, supra note 49, § 2227, at 3034.

⁶¹ See 1 MCCORMICK ON EVIDENCE, supra note 38, § 66, at 253; WEISSENBERGER, supra note 39, § 501.6, at 215; see also In re Witness Before Grand Jury, 791 F.2d 234, 236 (2d Cir. 1986); Ricafort, supra note 48, at 260. This privilege has historically been used to bar the testimony of wives against husbands. Richard O. Lempet, A Right to Every Woman's Evidence, reprinted in AN EVIDENCE ANTHOLOGY 183 (Edward J. Imwinkelried & Glen Weissenberger eds., 1996).

Ricafort, supra note 48, at 260. England finally abolished the spousal incompetency doctrine by the Evidence Amendment Act of 1853, replacing it with a privilege that forbade either spouse from being compelled to testify about any communication made by either spouse during the marriage. *Id.* The Evidence Amendment Act of 1853 also enacted that "no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage." 1 MCCORMICK ON EVIDENCE, supra note 38, § 78, at 293.

^{63 290} U.S. 371 (1933).

⁶⁴ Id. at 386. The petitioner had been convicted for conspiracy to violate the prohibition law. Id. at 373. At his trial, he called his wife as a witness to testify on his behalf, but the court refused to allow her to testify based upon the spousal incompetency doctrine. Id. In Funk, the Court identified the sole issue as "whether in a federal court the wife of the defendant on trial for a criminal offense is a competent witness [to testify on] his behalf." Id.

⁶⁵ *Id.* at 380-81. The basic reason for the prior exclusion of testimony by a spouse was the practice of disqualifying any witness with an interest in the case. *Id.* The Court reasoned that by refusing to allow a spouse to testify while allowing the defendant spouse, who had a greater interest in the outcome, to testify created an inconsistency. *Id.* at 381.

for the jury.⁶⁶ The Court still excluded the adverse testimony of a spouse because such testimony by a spouse would destroy the marriage, thus resulting in the creation of the adverse testimonial privilege.⁶⁷

The second marital privilege is the confidential communications privilege.⁶⁸ This privilege arose during the 1850s as a result of the limited application of the adverse testimonial privilege.⁶⁹ This privilege also stemmed from the state legislatures' recognition of the need for the explicit protection of confidential martial communications.⁷⁰

The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of truth . . . since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.

[&]quot;Id. The Court recognized that the federal courts, in the absence of legislation had the power to declare the current rule, based upon current standards, without regard to previous determinations of what the law had been. Id. at 382. The Court further reasoned:

Id. at 381.

⁶⁷ MUELLER & KIRKPATRICK, supra note 38, § 5.31, at 534; WEISSENBERGER, supra note 39, § 501.6, at 215. Professor Wigmore explained that the adverse testimonial privilege arose independently and prior to the development of the spousal disqualification rule. See 3 WIGMORE ON EVIDENCE, supra note 49, § 2227, at 3034; Familial Privileges, supra note 57, at 1564. Professor Wigmore suggested the true origin of the privilege was the late sixteenth century social and legal acceptance of the husband as the head of the household. See 3 WIGMORE ON EVIDENCE, supra note 49, § 2227, at 3035; Familial Privileges, supra note 57, at 1564. At that time if a wife or servant harmed the head of the household, the wife or servant could be charged with petit treason. See 3 WIGMORE ON EVIDENCE, supra note 49, § 2227, at 3035; Familial Privileges, supra note 57, at 1564-65. Therefore, to permit a wife or servant to indirectly commit such a crime and cause the death of the head of the household would have been irrational. See 3 WIGMORE ON EVIDENCE, supra note 49, § 2227, at 3035; Familial Privileges, supra note 57, at 1565.

⁶⁸ Lawson, supra note 41, at 895.

⁶⁹ Familial Privileges, supra note 57, at 1565. One reason for this may be that the spousal disqualification rule and the adverse testimonial privilege covered most attempts to introduce evidence that were also confidential communications. Id. Once the spousal disqualification rule was abolished, many states recognized the need for the confidential communications privilege. Id. These privileges have been criticized on the ground that they have a disparate gender impact because they predominantly prevent women from testifying more than men. See id. at 1587; Milton C. Regan, Jr., Spousal Privilege and the Meanings of Marriage, 81 VA. L. REV. 2045, 2144 (1995).

⁷⁰ Familial Privileges, supra note 57, at 1565.

The development of privileges by state courts and legislatures resulted in a wide disparity of approaches to these privileges.⁷¹ This disparity resulted in a call for national reform and the creation of uniform rules of evidence.72 Congress had previously granted the Supreme Court the power to promulgate uniform rules for the federal courts.73 Congress, however, retained the discretion to accept or reject the rules as proposed, or to make amendments.74 After the Supreme Court adopted the Advisory Committee's Draft of the proposed Rules of Evidence, there was intense congressional debate on the privilege section.⁷⁵ One of the major issues of concern was that the proposed Federal Rules of Evidence failed to include some privileges, such as the physician-patient and the confidential marital communications privileges.76 This was controversial because some legislators thought it was irrational to provide a spouse with the protection of the adverse testimonial privilege if the marriage was already in jeopardy, especially when the non-defendant spouse was willing to testify.77 Another issue of concern was that the proposed privileges would apply in diversity cases, as well as other cases where state law provided the rules for decision, thus abrogating state privilege laws.78

⁷¹ Ricafort, supra note 48, at 262.

⁷² Id.

⁷³ See Edward J. Imwinkelried, An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis, 73 NEB. L. REV. 511, 512 (1994).

⁷⁴ Id. This power had been exercised by the Supreme Court without incident for forty years. Id. However, this good working relationship disintegrated when the Supreme Court approved the Federal Rules of Evidence as drafted by the Advisory Committee. Id. In particular, the privilege section was considered to be "extremely controversial" and was subject to intense criticism Id. at 513; see also Rules of Evidence: Hearings Before the Comm. on the Judiciary United States Senate on Federal Rules of Evidence H.R. 5463, 93rd Cong. 356 (1974) (Senate Judiciary Comm. Staff Memorandum).

⁷⁵ Imwinkelried, *supra* note 73, at 513. The proposed rules would have recognized nine non-constitutional privileges: required reports, lawyer-client, psychotherapist-patient, spousal, communication to clergypersons, political vote, trade secrets, state secrets, and identity of informer. *See* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE §§ 502.02 - 510App.01[4], at 502-1 - 510App.-13 (2001). The proposed rules would have narrowed the existing privileges and restricted judicial development of privileges by freezing federal privilege law and denying federal courts the power to create new privileges. Imwinkelried, *supra* note 73, at 518.

⁷⁶ See MILITARY RULES, supra note 27, at 504; Imwinkelried, supra note 73, at 518.

⁷⁷ MILITARY RULES, supra note 27, at 405.

⁷⁸ MUELLER & KIRKPATRICK, supra note 38, § 5.6, at 423.

The Advisory Committee decided not to adopt the confidential communications privilege because the Committee considered this privilege to be ineffective as most married people are generally unaware of its existence and therefore do not rely on it when communicating with a spouse.⁷⁹ When enacting the Federal Rules of Evidence, Congress chose not to adopt specific privileges that the federal courts would be bound to recognize, but instead chose to adopt a broader view.80 Consequently, Congress enacted Federal Rule of Evidence 501, which established that privileges "shall be governed by the principles of the common law" as interpreted "in the light of reason and experience."81 However, Congress made it clear that the rejection of the enumerated privileges was not meant to indicate disapproval of such privileges.82 Instead, Congress intended that the privileges were to remain in their current state, unless modified by the decisions of the federal courts.83 The evolution of federal decisions regarding the martial privileges subsequently established the existence of the adverse testimonial privilege and the confidential communications privilege.84

3. The Adverse Testimonial Privilege85

The adverse testimonial privilege establishes the right of a spouse to refuse to testify against his or her spouse; thus, a court cannot compel a

⁷⁹ Id. § 5.32, at 561.

⁸⁰ See Ricafort, supra note 48, at 263.

FED. R. EVID. 501. This last phrase gives the courts the power to look to state statutes when making decisions. 1 MCCORMICK ON EVIDENCE, supra note 38, § 76.1, at 284; MUELLER & KIRKPATRICK, supra note 38, § 5.6, at 435. See, e.g., Trammel v. United States, 445 U.S. 40, 49-50 (1980) (holding that the adverse testimonial privilege belongs only to the witness spouse and giving substantial weight to the trend in state legislation and judicial decisions toward such a rule).

⁸² Ricafort, supra note 48, at 264. Congress refused to adopt a rule that would have prohibited the judicial development of new privileges. *Id.*

MUELLER & KIRKPATRICK, supra note 38, § 5.6, at 424.

^{**} Id. § 5.31 at 553; 2 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL, at 631 (6th ed. 1994) [hereinafter FEDERAL RULES]. Because these privileges exclude information by denying the litigant evidence necessary to prove a charge, privileges should be construed to exclude no more evidence than necessary to meet the goals for which the privilege was created. MUELLER & KIRKPATRICK, supra note 38, § 5.1, at 403.

Although the adverse testimonial and the confidential communication privileges overlap in practice, in reality they are different doctrines and supported by different justifications. Familial Privileges, supra note 57, at 1564.

spouse to testify and adversely affect the interests of the other spouse.⁸⁶ In *Hawkins v. United States*,⁸⁷ the Supreme Court refused to allow a person to be compelled to testify against his or her spouse.⁸⁸ In addition, the Court refused to allow the voluntary testimony of a spouse without the consent of the other spouse.⁸⁹ The Court reasoned that the law refused to pit spouses against each other because of the need to protect family harmony.⁹⁰ Furthermore, the Court reasoned that family harmony would be disrupted as much by voluntary testimony as by compelled testimony.⁹¹

Twenty years later, in *Trammel v. United States*, ⁹² the Court again addressed the issue of whether the accused may invoke the adverse testimonial privilege to exclude the voluntary testimony of a spouse. ⁹³

See MUELLER & KIRKPATRICK, supra note 38, § 5.31, at 553; Regan, supra note 69, at 2053. The adverse testimonial privilege is designed to protect the marital harmony at the time the testimony would be given. MUELLER & KIRKPATRICK, supra note 38, § 5.31, at 553.

7 358 U.S. 74 (1958).

⁸⁸ Id. at 79. The petitioner was convicted of violating the Mann Act by transporting a girl across state lines for immoral purposes. Id. at 74. Despite his objection, the government called his wife as a witness against him. Id. at 74-75. The Court refused to find that time and changing legal practices had undermined this rule, as the Court had found in Funk when it rejected the spousal incompetency doctrine. Id. at 79; see also supra notes 63-67 and accompanying text (discussing Funk v. United States).

⁵⁹ Hawkins, 358 U.S. at 78; see Amanda H. Frost, Updating the Marital Privileges: A Witness-Centered Rationale, 14 WIS. WOMEN'S L.J. 1 (1999) (proposing a witness-centered rationale for preserving privileges).

Mawkins, 358 U.S. at 77. The Court refused to "pit wife against husband or husband against wife" because such a "policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of public as well." Id.

⁹¹ Id. In fact, the Court believed that more bitterness would be created by the voluntary testimony of a spouse. Id. The Court rejected the government's argument that when a spouse voluntarily testified against the other spouse it was a strong indication that the marriage was already beyond a state of repair because the success of reconciliation is proof "some apparently broken homes can be saved provided no unforgivable act is done by either party." Id. at 77-78. Therefore, allowing the spouse's adverse testimony would likely destroy the marriage. Id. at 78. The Court also examined the practice of other jurisdictions and concluded the limited number of exceptions to this rule proves "that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences." Id.

^{92 445} U.S. 40 (1980).

⁹³ Id. at 41-42. The Court explicitly noted that it was re-examining Hawkins. Id. at 42. The petitioner was indicted for importing heroin into the United States and for conspiracy to import heroin. Id. at 42. Mrs. Trammel was indicted as a co-conspirator because she allegedly bought the heroin in Thailand and transported it back to the United States. Id. The heroin was discovered when she was stopped during a routine customs search. Id.

This time, based on "reason and experience," the Court redefined the adverse testimonial privilege as being held solely by the witness-spouse. The Court reasoned that because privileges impede the search for truth by suppressing evidence, they should be narrowly construed. Furthermore, the Court found that the ancient foundations for this privilege had disappeared because women were no longer regarded as property and now possessed an independent legal identity. Additionally, the Court found that the justifications for such a rule were insufficient because when a spouse was willing to testify against the other spouse, the marriage was probably in such a state that there was little harmony left to protect. Accordingly, the Court concluded that to prevent the voluntary testimony of a spouse under such circumstances would be more likely to frustrate rather than preserve family peace.

The adverse testimonial privilege does not apply in every court proceeding because certain conditions must be established by the spouse seeking to assert the application of the privilege. First, if the privilege is to apply, the couple must be lawfully married at the time of the trial. 100

She later agreed to cooperate with the government and testify against the defendant, her husband, when offered immunity. *Id.*

⁹⁴ Id. at 53. The Court reasoned that the long history of this privilege and its effect on marriage and family relationships suggested that the Court should not casually modify the privilege. Id. at 48. The Court examined the erosion of the adverse testimonial privilege in state legislatures and recognized a special relevance in the states "divesting the accused of the privilege" because "laws of marriage and domestic relations are concerns traditionally reserved to the states." Id. at 49-50. The Court also relied on Congress' intent "not to freeze the law of privilege" but to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis." Id. at 47.

^{*} Id. at 52. The Court recognized that this privilege had allowed a man's castle to be converted into "a den of thieves" because it gave every man "one safe and unquestionable and every [sic] ready accomplice for every imaginable crime." Id. at 51-52.

[&]quot; Id. at 52. The Court stated that "[w]hen one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve." Id. But this reasoning is not without criticism. Steven N. Gofman, Note, "Honey, the Judge Says We're History": Abrogating the Marital Privileges via Modern Doctrines of Marital Worthiness, 77 CORNELL L. REV. 843, 858 (1992). It has been argued that the stress of a criminal prosecution may create the marital rift leading one spouse to testify against the other. Id. However, this does not inevitably lead to the end of the marriage since not all marital problems result in divorce. Id.

⁹⁸ Traininel, 445 U.S. at 52.

⁹⁹ Frost, supra note 89, at 12.

See MUELLER & KIRKPATRICK, supra note 38, § 5.32, at 563; WEISSENBERGER, supra note 39, § 501.6, at 217. See, e.g., United States v. Lustig, 555 F.2d 737, 747-48 (9th Cir. 1977) (finding

Common law marriages are included within the scope of the privilege only if the jurisdiction where the couple lives recognizes such marriages as valid.¹⁰¹ The existence of the privilege terminates with the end of the marriage, whether by death, divorce, or annulment.¹⁰² Furthermore, the scope of the adverse testimonial privilege is not absolute.¹⁰³ Although the privilege covers all subjects including those discussed before or during the marriage, not just confidential marital communications, the privilege is limited to adverse testimony.¹⁰⁴ Therefore, a spouse only has the right to refuse to answer questions that tend to incriminate the non-testifying spouse.¹⁰⁵ Questions that do not incriminate the other spouse are not protected because the answers do not threaten the sanctity and harmony of the marriage.¹⁰⁶

Because of the controversy surrounding the exclusion of relevant evidence, and the resulting hindrance in the search for the truth, there

the existence of either the adverse testimonial privilege or the confidential communication privilege depends on the "existence of valid marriage, as determined by state law"). But see Gofman, supra note 97, at 861 (arguing that courts lack the expertise to determine if a marriage has deteriorated to the point that it no longer deserves protection and that courts have failed to establish clear standards for determining the viability of a marriage).

¹⁰¹ See MUELLER & KIRKPATRICK, supra note 38, § 5.32, at 563; see also United States v. Acker, 52 F.3d 509, 515 (4th Cir. 1995) (prohibiting the accused from asserting the marital 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) (requiring a valid marital relationship for the adverse testimonial privilege to apply and indicating this did not include those circumstances where the parties simply lived together); United States v. Mathis, 559 F.2d 294, 298 (5th Cir. 1977) (refusing to grant the adverse testimonial privilege to parties merely living together); MUELLER & KIRKPATRICK, supra note 38, § 5.31, at 556.

¹⁰² WEISSENBERGER, supra note 39, § 501.6, at 217; see also Pereira v. United States, 347 U.S. 1, 6 (1954) (stating that divorce ends "any bar of incompetency"); Yaldo v. Immigration and Naturalization Serv., 424 F.2d 501, 502 (6th Cir. 1970) (finding the adverse testimonial privilege terminated by an annulment).

103 WEISSENBERGER, supra note 39, § 501.6, at 216.

ld. at § 501.6, at 216. See 2 FEDERAL RULES, supra note 84, at 632-33; 1 MCCORMICK ON EVIDENCE, supra note 38, § 81, at 301; MUELLER & KIRKPATRICK, supra note 38, §§ 5.31-32, at 553, 563; see also United States v. Clark, 712 F.2d 299, 302 (7th Cir. 1983) (approving an exception to adverse testimonial privilege for pre-marital acts); United States v. Apodaca, 522 F.2d 568, 570-71 (10th Cir. 1975) (noting the application of the adverse testimonial privilege would apply to matters occurring prior to marriage but affirming the denial of the privilege because the marriage was a fraud). But see United States v. Van Drunen, 501 F.2d 1393, 1397 (7th Cir. 1974) (finding that because the testimony concerned matters occurring prior to the marriage the adverse testimonial privilege did not apply).

105 1 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 505.1, at 565 (1996).

106 ld.

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have been several justifications put forth supporting this privilege. The most common justification for the existence of the adverse testimonial privilege is the protection of the sanctity and harmony of the marital relationship.¹⁰⁷ Without the privilege, if a spouse was allowed to testify in a criminal proceeding against the other spouse, such an act would probably constitute an "unforgivable act" that would seal the end of the marriage.¹⁰⁸ Some commentators suggest that to pit one spouse against the other, without the consent of either, would violate fundamental societal values.¹⁰⁹ Other commentators have argued for the elimination of this privilege because family harmony is probably already in a state beyond repair if the spouse is willing to testify against the other spouse.¹¹⁰ Because the privilege's goal is to protect viable marriages from such destructive rifts, some courts have refused to apply the privilege when the court considers the marriage over or damaged beyond repair.¹¹¹

¹⁰⁷ See MUELLER & KIRKPATRICK, supra note 38, § 5.31, at 554-55; WEISSENBERGER, supra note 39, § 501.6, at 215.

 $^{^{108}}$ See MUELLER & KIRKPATRICK, supra note 38, § 5.31, at 554-55; Weissenberger, supra note 39, § 501.6, at 215.

¹⁰⁹ MUELLER & KIRKPATRICK, supra note 38, § 5.31, at 555.

¹¹⁰ 1 MCCORMICK ON EVIDENCE, supra note 38, § 66, at 254-55. The Court adopted the confidential communications privilege in two previous cases, but in neither case did the court adopt the position of substituting the confidential communications privilege for the adverse testimonial privilege. See Blau v. United States, 340 U.S. 332 (1951); Wolfle v. United States, 291 U.S. 7 (1934).

WEISSENBERGER, supra note 39, § 501.6, at 217; see, e.g., United States v. Brown, 605 F.2d 389, 396 (8th Cir. 1979) (finding that since the accused's spouse had not been with her husband for two weeks and had not seen him in the eight months between his leaving and the trial, it was difficult to visualize how preserving the marital bond would have required her exclusion as a witness); United States v. Cameron, 556 F.2d 752, 756 (5th Cir. 1977) (finding that because the marriage in that case was no longer viable, the traditional policy reasons for the privilege did not exist and refused to apply the privilege); see also In re Witness Before Grand Jury, 791 F.2d 234, 237 (2d Cir. 1986) (finding such reasoning followed the Traininel Court's reasoning that this privilege could not be used by a spouse seeking to stop the voluntary testimony of the other spouse, because when one spouse is willing to testify against the other, the marriage is obviously beyond repair). But see United States v. Lilley, 581 F.2d 182, 189 (8th Cir. 1978) (refusing to condition application of the adverse testimonial privilege on a determination the marriage was happy because such a finding would create a burden on judicial administration). It has been further argued that the meaning and purpose of this privilege is not respected when courts deny application of the privilege because the courts consider the marriage unworthy of this protection. Gofman, supra note 97, at 871-72.

4. The Confidential Communications Privilege

The second marital privilege is the confidential communications privilege. This privilege refers not to whether a spouse may testify against the other spouse, but whether a spouse may testify to confidential communications made between the spouses. Like the adverse testimonial privilege, the justification for the confidential communications privilege is the preservation of marital harmony. However, unlike the adverse testimonial privilege, the confidential communications privilege prevents the spouse from testifying about the conversation, even if the marriage is in a state of disrepair, because the spouse had a right to rely on marital intimacy when making the statement.

Additional justifications for the continued existence of this privilege include the need for encouraging the free flow of information between spouses and protecting the privacy of marital relationships. The confidential communications privilege is further justified on the ground that it protects the privacy and trust that are necessary for the preservation of marital relationships, and thus, allows spouses to openly

¹¹² Professor Wigmore analyzed the general principles of any confidential communication privilege as only applying when four fundamental conditions necessary to the establishment of the privilege have been established. 5 WIGMORE ON ANGLO AMERICAN EVIDENCE, supra note 41, § 2285, at 1; see also Smith-Klocek, supra note 44, at 110-11. First, the "communications must originate in a confidence that they will not be disclosed." See 5 WIGMORE ON ANGLO AMERICAN EVIDENCE, supra note 41, § 2285, at 1; Smith-Klocek, supra note 44, at 110-11. Second, the "element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties." See 5 WIGMORE ON ANGLO AMERICAN EVIDENCE, supra note 41, § 2285, at 2; Smith-Klocek, supra note 44, at 110-11. Third, the "relation must be one which in the opinion of the community ought to be sedulously fostered." See 5 WIGMORE ON ANGLO AMERICAN EVIDENCE, supra note 41, § 2285, at 1; Smith-Klocek, supra note 44, at 110-11. Fourth, the "injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation. See 5 WIGMORE ON ANGLO AMERICAN EVIDENCE, supra note 41, § 2285, at 2; Smith-Klocek, supra note 44, at 110-11. Professor Wigmore recognized that this policy was "amply satisfied" for confidential communications between spouses. 5 WIGMORE ON ANGLO AMERICAN EVIDENCE, supra note 41, § 2332, at 83.

¹¹³ WEISSENBERGER, supra note 39, § 501.6, at 218.

¹¹⁴ MUELLER & KIRKPATRICK, supra note 38, § 5.1, at 400.

¹¹⁵ FEDERAL RULES, supra note 84, at 632.

¹¹⁶ MUELLER & KIRKPATRICK, supra note 38, § 5.1, at 400; see also WEISSENBERGER, supra note 39, § 501.3, at 199.

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communicate and confide in each other.¹¹⁷ Critics contend that this privilege has no real effect on the behavior of married couples since most individuals are unaware of the existence of such a privilege.¹¹⁸ Regardless of whether married couples are aware of the confidential communications privilege, federal courts recognize such communications between a married couple as privileged.¹¹⁹ Under Federal Rule of Evidence 501, the confidential communications privilege allows a defendant to prevent his or her spouse from disclosing confidential statements made between them during the course of the marriage, even if the spouse wishes to testify about the conversation.¹²⁰

¹¹⁷ See MUELLER & KIRKPATRICK, supra note 38, § 5.32, at 560; see also Wolfle v. United States, 291 U.S. 7, 14 (1934) (describing marital communications "as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails"). Because this privilege is meant to promote marital harmony, once the marriage has come to an end, the privilege ends. United States v. Termini, 267 F.2d 18, 19-20 (2d Cir. 1959).

¹¹⁸ WEISSENBERGER, supra note 39, § 501.6, at 218; see also 1 McCORMICK ON EVIDENCE, supra note 38, § 86, at 309-310 (stating the anticipation of legal proceedings "is not one of those factors which materially influence in daily life the degree of fullness of marital disclosures"); 3 WEINSTEIN & BERGER, supra note 75, §505App.01[2], at 505App.-2. advisory committee note (Proposed Rev. Draft 1971) (acknowledging the confidential communication privilege is one "of whose existence the parties in all likelihood are unaware"); Robert M. Hutchins & Donald Slesinger, Some Observations on the Law of Evidence: Family Relations, 13 MINN. L. REV. 675, 682 (1929) (indicating that practically no one but lawyers are aware of the confidential communications privilege and furthermore that marital harmony among lawyers aware of the privilege was not better than that of other professionals); 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). But some commentators have countered these arguments by noting that even though most couples may be unaware of such a privilege, they nonetheless expect complete confidentiality and despise the forced disclosure of such communications. Watts, supra note 45, at 597.

¹¹⁹ See Blau v. United States, 340 U.S. 332, 333-34 (1951) (recognizing that confidential marital communications are privileged); Wolfle, 291 U.S. at 14 (finding communications between spouses are assumed to be confidential and therefore privileged unless the communication was not intended to be confidential). The confidential communications privilege does not apply when the communicating spouse is attempting to further a crime or fraud because such a communication is considered to be worth no more protection than when made to an attorney. FEDERAL RULES, supra note 84, at 633.

¹²⁰ See MUELLER & KIRKPATRICK, supra note 38, § 5.31, at 553, 560; 2 FEDERAL RULES, supra note 84, at 631-32. The confidential communications privilege is designed to protect the privacy and trust in the relationship at the time of the communication. MUELLER & KIRKPATRICK, supra note 38, § 5.31, at 553, 560; see also United States v. Short, 4 F.3d 475, 478 (7th Cir. 1993) (describing the value that society places on uninhibited communications

This privilege is, however, limited to confidential communications made during the marriage.¹²¹

There are three requirements that must be met for this privilege to apply. The party seeking to assert the existence of the confidential communications privilege has the burden of proving the applicability of the privilege. First, there must be a valid marriage. This requirement only includes common law marriages if the jurisdiction where the couple resides recognizes such marriages as valid. 125

between married couples and society's encouragement of married people to confide in each other).

121 See 1 MCCORMICK ON EVIDENCE, supra note 38, § 81, at 301; MUELLER & KIRKPATRICK, supra note 38, §§ 5.31-32, at 553-54, 563; 2 FEDERAL RULES, supra note 84, at 632-33; see also Pereira v. United States, 347 U.S. 1, 56 (1954) (finding a divorce did not terminate the confidential communications privilege for communications made during the marriage); In re Witness Before Grand Jury, 791 F.2d 234, 237 (2d Cir. 1986) (finding there was no privilege when the witness-spouse is permanently separated from the other spouse, even though not legally divorced or separated); Termini, 267 F.2d at 20 (excluding postmarital communications from the confidential communications privilege); State v. Dikstaal, 320 N.W.2d 164, 166 (S.D. 1982) (excluding premarital communications from the confidential communications privilege). There is also no privilege when the communication occurs between spouses who are jointly engaged in criminal activity. United States v. Picciandra, 788 F.2d 39, 43 (1st Cir. 1986); see also United States v. Keck, 773 F.2d 759, 767 (7th Cir. 1985) (finding the confidential communications privilege did not apply because the spouses were "joint participants" in a crime). In United States v. Estes, the court explained this exception as reflecting the idea that a "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." 793 F.2d 465, 468 (2d Cir. 1986).

society's interest in protecting the confidentiality of the relationships of permanently separated spouses is outweighed by the need to secure evidence in the search for truth that is the essence of a criminal trial, and that proof of permanent separated status at the time of the communication . . . renders the communications privilege automatically inapplicable.

United States v. Byrd, 750 F.2d 585, 594 (7th Cir. 1984).

¹²² WEISSENBERGER, supra note 39, § 501.6, at 219-20.

¹²⁹ United States v. Knox, 124 F.3d 1360, 1365 (10th Cir. 1997); see also United States v. Acker, 52 F.3d 509, 514-15 (4th Cir. 1995).

¹²⁴ See 1 MCCORMICK ON EVIDENCE, supra note 38, § 81, at 301; MUELLER & KIRKPATRICK, supra note 38, § 5.32, at 563.

¹²⁵ See, e.g., United States v. Lustig, 555 F.2d 737, 748 (9th Cir. 1977) (denying the privilege because Alaska did not recognize common law marriages). A permanent, but not necessarily legal, separation can negate the application of this privilege. As one court has stated:

Second, the privilege only covers communications which are intended to convey a meaning.¹²⁶ A communication may include oral or written words, sign language, and expressive actions.¹²⁷ The definition of a confidential communication for purposes of this privilege parallels the definition of nonverbal conduct qualifying as a "statement" for purposes of the hearsay doctrine.¹²⁸ The third requirement is that the communication must be confidential; therefore, communications intended to be disclosed to other individuals or made in the presence of third persons are not privileged.¹²⁹ Marital communications are presumed to be confidential, so the burden is on the prosecution to prove the lack of confidentiality.¹³⁰ Even when all the prerequisites for a privilege have been established, the privilege may still be inapplicable

¹²⁶ See 1 MCCORMICK ON EVIDENCE, supra note 38, § 79, at 296.

¹²⁷ Id.; see, e.g., United States v. Madoch, 149 F.3d 596, 602 (7th Cir. 1998) (finding that communications to an incarcerated spouse lack the required expectation of privacy); United States v. Bahe, 128 F.3d 1440, 1445 (10th Cir. 1997) (finding that intimate sexual acts between spouses may be protected by the confidential communications privilege). However, observations of noncommunicative behavior, appearance, and physical or emotional conditions are not confidential communications. MUELLER & KIRKPATRICK, supra note 38, § 5.32, at 564.; see, e.g., United States v. Hook, 781 F.2d 1166, 1173 n.11 (6th Cir. 1986) (finding that a husband giving his wife money to pay the bills was not a communication); United States v. Ferris, 719 F.2d 1405, 1408 (8th Cir. 1983) (observing LSD in trunk of car was not a communication); Lustig, 555 F.2d at 748 (reasoning a spouse observing another spouse engaging in drug transactions was not communicative, even if drug dealing was a "communication," because the privilege was invalid due to the presence of third parties whom negated the element of confidentiality).

MUELLER & KIRKPATRICK, supra note 38, § 5.32, at 564.

¹²⁹ See id. at § 5.32, at 565; see, e.g., Wolfle v. United States, 291 U.S. 7, 13-14 (1934) (reasoning the presence of a stenographer prohibited the application of the confidential communications privilege because of the accused's voluntary disclosure to that third person); see also United States v. Marashi, 913 F.2d 724, 730 (9th Cir. 1990) (finding the presence of a third person destroyed the application of the privilege); United States v. Parker, 834 F.2d 408, 411 (4th Cir. 1987) (indicating the confidential communications privilege did not generally apply to acts); Grulkey v. United States, 394 F.2d 244, 246 (8th Cir. 1968) (finding a letter to a wife was not confidential because her husband knew she would need help reading the letter); Master v. Master, 166 A.2d 251, 255 (Md. 1960) (finding the confidential communications privilege did not apply to statements made by a husband in the presence of children who were old enough to understand what was said). But see, e.g., Hicks v. Hicks, 155 S.E.2d 799, 801-02 (N.C. 1967) (deciding the presence of an eight-year-old child did not destroy the confidentiality of the communication).

¹³⁰ Pereira v. United States, 347 U.S. 1, 6 (1954) (stating that although marital communications are presumed to be confidential, that presumption may be overcome by facts showing they were not intended to be private); *Marashi*, 913 F.2d at 730. Additionally, deliberate disclosure of the communication by the communicating spouse without another privilege protecting such disclosure results in the waiver of the privilege. United States v. Rakes, 136 F.3d 1, 5 (1st Cir. 1998).

because both of the privileges have exceptions for offenses committed against a spouse or "a child of either spouse."

C. Federally Recognized Exceptions to the Marital Privileges

The recent trend in the area of privileges is to narrow existing privileges, especially by expanding any exceptions to those privileges. ¹³¹ When making a decision whether to recognize an exception to a particular privilege, the courts generally balance the value of the privilege with the societal cost of recognizing the privilege. ¹³² As a result of this balance between conflicting interests, the common law recognized an exception to the spousal incompetency doctrine for prosecutions involving a crime against the witness spouse. ¹³³ Courts subsequently expanded this exception to include prosecutions for violent crimes or sexual offenses against "a child of either spouse." ¹³⁴ These exceptions to the marital privileges are designed to compel a spouse to testify when the other spouse has committed a crime against that spouse or some third party, especially children. ¹³⁵ This Part focuses on the meaning and extent of the exceptions to the marital privileges as they have been

^{131 2} FEDERAL RULES, supra note 84, at 592. This trend may be the result of increased litigation which makes judges more concerned with removing barriers to the presentation of evidence or to the decreasing acceptance of the value traditionally given to privileges. *Id.*

¹³² Lempet, supra note 61, at 182.

¹³³ Wayne F. Foster, Annotation, Competency of One Spouse to Testify Against Other in Prosecution for Offense Against Child of Both or Either, 93 A.L.R.3d 1018, 1024 (1979).

^{134 2} FEDERAL RULES, supra note 84, at 635; see Trammel v. United States, 445 U.S. 40, 46 n.7 (1980) (recognizing an exception to the adverse testimonial privilege when "one spouse commits a crime against the other" or "crimes against children of either spouse"); United States v. White, 974 F.2d 1135, 1138 (9th Cir. 1992) (finding the confidential communications privilege did not apply to "statements relating to a crime where a spouse or a spouse's children are the victims"); United States v. Allery, 526 F.2d 1362, 1366-67 (8th Cir. 1975) (finding the adverse testimonial privilege did not apply when the spouse or his or her children were victims of a crime committed by the other spouse); MUELLER & KIRKPATRICK, supra note 38, § 5.31, at 559. Uniform Rule of Evidence 504 recognizes an exception to the marital privileges when a spouse is charged with a crime against the person or property of "an individual residing in the household of either" and where the victim is a third person if the crime is committed while committing a crime against the spouse, a minor child of either." UNIF. R. EVID. 504; see also discussion infra Part III.

¹³⁵ See Renee L. Rold, All States Should Adopt Spousal Exception Statutes, 55 J. Mo. B. 249, 252 (1999).

developed by federal and military courts in regard to children who are not "a child of either spouse." 136

1. The Federal Judiciary

The meaning and extent of this exception to the marital privileges arose in several different cases, with a general trend toward increasing the scope of the exception. United States v. Allery¹³⁷ was a case of first impression in the federal courts.¹³⁸ The court addressed the issue of whether the exception to the adverse testimonial privilege, which allows the adverse testimony of a spouse to be admitted when the alleged crime involved an offense against the spouse, also allowed the adverse testimony of a spouse to be admitted when the harm was directed toward the defendant's child or stepchild. 139 The court recognized the Advisory Committee's acknowledgment of the need to allow a spouse to testify against the other spouse when an alleged crime had been committed against "a child of either spouse." 140 The court decided to expand the exceptions to the adverse testimonial privilege to include crimes committed against "a child of either spouse" because "reason and experience" demanded such a result.141 The court relied on the conclusions that an offense against "a child of either spouse" is also an

141 Allery, 526 F.2d at 1366.

¹³⁶ This Part of the Note will not be divided into separate sections for the adverse testimonial and confidential communications privileges because in practice both privileges may and often do arise in the same case.

^{137 526} F.2d 1362 (8th Cir. 1975).

¹³⁸ Id. at 1365. Mr. Allery was indicted prior to the adoption of the Federal Rules of Evidence. Id. at 1364 n.2. However, part of the language of Rule 26 of the Federal Rules of Criminal Procedure states:

[&]quot;[t]he admissibility of evidence and the competency and privileges of witness shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" became part of Federal Rule of Evidence 501.

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¹³⁹ *Id.* Mr. Allery was accused of attempting to rape his twelve-year-old daughter. *Id.* at 1363. He had been drinking heavily on the night of the offense and testified that he did not remember anything from the time he returned home to the time he woke up at the police station. *Id.* His wife testified in a manner incriminating him. *Id.*

¹⁴⁰ Id.; see also 3 WEINSTEIN & BERGER, supra note 75, § 505App.01, at 505App.-1. The court had also examined the legislative history of the rejection of this rule and concluded that Congress' rejection of the rule "did not indicate that Congress disapproved of the expansion of this exception but rather that any substantive changes should be done on a case-by-case basis." Allery, 526 F.2d at 1366.

offense to both family harmony and society, that there is a need for parental testimony in such cases, and the strong state support for such an exception. Later in *Trammel*, the Supreme Court recognized a similar exception to the adverse testimonial privilege and indicated in a footnote that such an exception also existed for the confidential communications privilege. 143

This exception to the confidential communications privilege was again examined in *United States v. White.* ¹⁴⁴ In *White*, the court balanced society's interest in protecting the integrity of marriages with a narrow construction of privileges based on society's interest in the administration of justice, and it concluded that the confidential communications privilege should not apply when either the spouse or the spouse's children were the victims of an offense committed by the other spouse. ¹⁴⁵ Although recognizing that *Allery* involved the adverse testimonial privilege, not the confidential communications privilege, the court found that the rationale in *Allery* was still applicable to the expansion of exceptions to the confidential communications privilege. ¹⁴⁶

¹⁴² Id. The court examined the policy behind the adverse testimonial privilege and recognized not only the vitality of the justification of preserving family peace but also that a "serious crime against a child is an offense against that family harmony and to society as well." Id. Second, the court acknowledged the necessity for parental testimony in child abuse prosecutions because more than 90% of reported instances of child abuse occur in the home and that in those cases more than 87% of the abusers were either the parent or a parent substitute. Id. Third, the court recognized a rule which "impedes the discovery of truth in a court of law impedes as well the doing of justice." Id. Fourth, the court discussed the strong state precedent for the expansion of the exception to the privilege. Id. at 1366-67, 1367 n.7. Finally, the court relied on the fact that at least eleven states had already passed laws making the privilege inapplicable in cases of child abuse and neglect. Id. at 1367.

¹⁴³ Trammel v. United States, 445 U.S. 40, 46 n.7 (1980).

^{144 974} F.2d 1135 (9th Cir. 1992).

stepdaughter, Jasmine. *Id.* at 1137. Jasmine died from severe head injuries inflicted while she was under the defendant's care at her mother's military residence. *Id.* The defendant was frustrated with his role as caregiver and had previously threatened to kill his stepdaughter and his wife if forced to continue caring for Jasmine. *Id.* The court reasoned that to protect threats against the spouse or the spouse's children would be inconsistent with the goal of the confidential communications privilege and that the public's interest in justice outweighed any purpose of this privilege. *Id.* at 1138.

¹⁴⁶ Id. The court also relied on a footnote in *Trammel* which noted the confidential communications privilege did not apply to children of either spouse. Id. at 1138; see also *Trammel*, 445 U.S. at 46 n.7.

United States v. Bahe¹⁴⁷ further extended this exception to the confidential communications marital privilege by recognizing an exception for confidential communications relating to the abuse of a minor child living in the home.¹⁴⁸ The court recognized the lack of unanimous agreement in the courts as to the extent of this exception.¹⁴⁹ As a matter of policy, however, the court found that there was no significant difference in crimes committed against a child of the married couple compared to crimes committed against a stepchild or other minor relative residing in the home.¹⁵⁰ Furthermore, the court considered child abuse to be a "horrendous crime" that generally occurs in the home and is usually hidden by the child's innocence or threats against the child.¹⁵¹ Based on "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 spouse from testifying against such a spouse.¹⁵²

This privilege was also the source of dispute in *United States v. Martinez*.¹⁵³ Although *Martinez* involved the abuse of a spouse's biological children, the court relied on the reasoning and justifications of *Bahe*, along with its own "reason and experience," to hold that the confidential communications privilege should not apply when a crime has been committed against a minor child.¹⁵⁴ The court reasoned that

^{147 128} F.3d 1440 (10th Cir. 1997), cert. denied, 523 U.S. 1033 (1998).

¹⁴⁸ ld. at 1441. The court recognized an "exception to the marital communications privilege for spousal testimony relating to the abuse of a minor child within the household." ld. at 1446. The defendant was charged with sexually abusing an eleven-year-old female relative residing in his home. ld. at 1441. He was alleged to have penetrated her vagina with his hand and finger. ld. His wife wanted to testify that sometimes when she was asleep her husband tried to initiate sex by penetrating his hand and finger inside her vagina and bending the finger into a hook shape and forcefully pulling it out. ld. The government wanted to introduce this testimony because this was the same act described by the victim. ld.

¹⁴⁹ Id. at 1446. The court specifically compared the broad scope of the Texas exception to the confidential communications privilege for a crime against any minor child to both Michigan's and the District of Columbia's narrow approach of only extending such an exception to children of either spouse. See infra notes 176, 193, 214 and accompanying text.
150 Balie, 128 F.3d at 1446.

^{151 14}

¹⁵² *Id.* The court refused to prevent a "properly outraged spouse with knowledge from testifying against the perpetrator of such a crime." *Id.*

 ⁴⁴ F. Supp. 2d 835 (W.D. Tex. 1999). The defendant was charged with numerous counts of child abuse for injuring her two sons while the boys were patients at Wilford Hall Medical Center, which is located at Lackland Air Force Base, a federal enclave. *Id.* at 836.
 16. at 835, 837.

when a spouse is accused of child abuse, there is little marital harmony left to preserve.¹⁵⁵ The court balanced the protection of children with the preservation of marital harmony and decided that the preservation of marital harmony must fall in favor of protecting children who cannot defend themselves because they are voiceless, powerless, and vulnerable to abuse.¹⁵⁶ The court reasoned that to allow any other result "would make children a target population within the marital enclave."¹⁵⁷

2. The Military Justice System

The military adopted specific privileges because many servicemembers were stationed in locations where they did not have easy access to legal advice. 158 One of the primary authors of the MRE indicated that the rules can and should be changed as society and the law change, and that the structure of the rules should ensure that the military justice system is at the forefront of criminal justice.¹⁵⁹ The military justice system has addressed factual situations similar to the issue that this Note addresses, but it has not yet judicially extended the exception to the marital privileges to include scenarios such as Michelle's

¹⁵⁵ Id. at 837.

¹⁵⁶ *ld*. The court further reasoned that when a parent abuses a child, the reason for protecting confidential marital communications must yield to protecting children. *ld*.

¹⁵⁷ Id. The court indicated that it had made a thorough search of the law and had not found any authority precluding this exception in cases of child abuse. Id. The court admitted, however, that it had not undertaken a historical review of the privilege or searched "the dark corners of the world, nor that era when mankind lived within the confines of a cave that might call for a contrary reason." Id.

¹⁵⁸ Lederer, supra note 12, at 16. Specific privileges were included to "provide concrete guidance to a world-wide criminal justice system which makes wide use of lay person in disposing of criminal charges." MILITARY RULES, supra note 27, at 628. The rules were written to provide certainty and predictability to military law. Lederer, supra note 12, at 37. The worldwide dispersion of armed forces, the lack of legal advice and the need for consistent procedures throughout the armed forces provide justification for the intentionally "concrete" MRE. Id. The MRE recognize eight specific privileges: the lawyer-client privilege, clergy communications, the husband-wife privilege, the classified information privilege, the government information other than classified information privilege, the identity of informant, the political vote, and deliberations of courts and juries.

¹⁵⁹ Lederer, supra note 12, at 39. The co-author believed that the structure of the rules "should ensure a vibrant military legal system at the forefront of criminal justice in the United States." *Id*.

In United States v. McElhaney,¹⁶⁰ Staff Sergeant McElhaney was accused of committing sexual offenses against his wife's niece.¹⁶¹ The trial judge clearly indicated that the niece did not fall within the exception for a crime against "a child of either spouse."¹⁶² Instead, the judge ruled that the marital privilege did not apply because the defendant's sexual actions with the victim were a crime against the wife.¹⁶³ The Air Force Court of Criminal Appeals ruled that military law, however, did not support such a conclusion.¹⁶⁴ The court reasoned that whether a charged offense is a crime against a spouse depends not on an outrage of emotion or a violation of the marital promises, but on a direct relationship with the spouse's person or property.¹⁶⁵ This ruling led the judges to note, sua sponte, that there may be a gap in the exceptions to the marital privileges that the drafters should amend to include

^{160 50} M.J. 819 (A.F. Ct. Crim. App. 1999).

^{16.} Id. at 822. The niece lived with the defendant and his wife. Id. After the prosecution rested, the defendant indicated his intent to call his wife as a witness. Id. at 829. He then requested that the military judge prohibit the prosecution from questioning her about a statement that he had made to her. Id. The wife testified that the defendant had admitted to attempting to have sexual intercourse with her niece but "got scared so they had to stop." Id. at 830. She further testified that the defendant admitted to her that he loved her niece and had previously kissed the niece Id.

^{16.} In addition to precluding the privilege when a crime is committed against a child of either, MRE 504(c)(2)(A) also establishes that there is no privilege when a spouse is charged "with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse." MIL. R. EVID. 504(c)(2)(A).

¹⁶⁴ McElhaney, 50 M.J. at 830. 165 ld. The court stated "[w]hether an offense charged against one spouse injures the other depends not upon the outrage to her sensibilities or a violation of the marital bonds, but upon some direct connection with her person or property." Id. In United States v. Massey, the court found that "carnal knowledge, even when incestuous, is not a direct injury to a spouse" for purposes of the exception to the marital privileges, thus requiring something more than conduct even if such conduct abuses privileges and responsibilities. 35 C.M.R. 246, 254-55 (C.M.A. 1965). The court concluded there must be a "direct, palpable invasion of, or injury to, the interests of the witness." Id. at 255. However, in United States v. Menchaca, the court made the holding of Massey obsolete by finding child abuse to be an offense against the spouse. 48 C.M.R. 538, 540 (C.M.A. 1974). The court reasoned that the effect of Massey was "not compatible with the needs of the military service, especially overseas" where large groups of servicemembers and their dependents live in close communities. Id. The court reasoned "[i]n these communities and generally in military life, child beating and child molestation by parents cannot be tolerated and certainly should not be facilitated by a rule of evidence." Id. Furthermore, because the privilege is based on public policy, it should yield to greater public policy in the opposite direction. Id. The McElhaney court found, however, that the statement was admissible because Staff Sergeant McElhaney had waived the privilege when he told the victim's parents the same information that he told his wife. McElhaney, 50 M.J. at 830.

circumstances where a spouse is a guardian or in loco parentis to a child. On appeal to the Court of Appeals for the Armed Forces, 167 Judge Sullivan found that molesting a child is a crime against the marriage even if the child was neither adopted nor a biological child. He went on to explain that the confidential communications privilege did not apply in that particular case because the niece was a de facto child since the wife was the niece's guardian. 169

III. STATE EXCEPTIONS AND THE NEED FOR AN AMENDED MRE 504(C)(2)(A)

The Federal Rules of Evidence do not govern state court decisions, so the states are free to establish their own evidentiary rules.¹⁷⁰ As a result, the states have developed a wide variety of exceptions to the marital privileges.¹⁷¹ This Part describes the various approaches taken by the states and explains both the need and the justifications for amending

¹⁶⁶ Id. at 830 n.6. The court noted "[t]his is a gap which the drafters may deem appropriate to address by extending the exception to cover a child for whom either is the guardian or stands In Loco Parentis [sic]." Id.

¹⁶⁷ United States v. McElhaney, 54 M.J. 120 (C.A.A.F. 2000).

¹⁶⁸ Id. at 137. He stated "[i]t is a crime against the marriage for one spouse to molest the other spouse's child, even though the alleged victim was neither a marital nor adopted child of either spouse." Id. Judge Sullivan concluded the niece was protected by the exception because the defendant's wife was the niece's guardian when the niece was molested. Id. Chief Judge Crawford noted this distinction was not necessary to the disposition of this case but agreed that "[i]t is a crime against the marriage for one spouse to molest the other spouse's child, . . . even though the alleged victim was neither a marital nor adopted child of either spouse." Id. at 134-35. (Crawford, C.J., concurring in part, and dissenting, in part). Judge Sullivan had previously addressed this issue in United States v. McCarty. 45 M.J. 334 (C.A.A.F. 1996). In McCarty, the appellant was convicted of sexual misconduct with his niece. Id. at 334. Judge Sullivan believed the niece was a "de facto" child of the appellant and his wife for purposes of MRE 504(c)(2)(A) because she had lived with the appellant for ten years, from the time she was two until she was twelve. Id. at 336 (Sullivan, J., concurring). However, Judge Sullivan did not express which aspect of MRE 504(c)(2)(A) he was referring to. Id. Senior Judge Everett agreed with the rejection of the spousal privilege because the wife's testimony was hearsay. Id. at 338 (Everett, S.J., dissenting). However, he recognized that the appellant and his wife had raised the niece as their child for the last ten years, and that there was no doubt "the purpose behind refusing the privilege to one accused of a crime against the couple's child would apply with equal force where the child was in the custody of the couple and for many years had been raised as their own." Id.

¹⁶⁹ McElhaney, 54 M.J. at 137.

¹⁷⁰ FED. R. EVID. 101.

¹⁷¹ Because courts-martial are criminal proceedings, this Note will only address exceptions for criminal proceedings. However, many of the state statutes or rules of evidence address both criminal and civil proceedings in the same section.

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MRE 504(c)(2)(A) to expand the exceptions to the martial privileges to include situations where non-biological children are abused by an adult in the home. Some states have taken a liberal approach and narrowed the marital privileges so that there is no privilege in criminal proceedings where the spouse is charged with a crime against the person or property of the other spouse, a child of either spouse, or a person residing in the home of either.¹⁷² Other states, and the military, have limited such an exception to include only those offenses committed against the spouse or "a child of either spouse." 173 A third approach has been to limit such exceptions to the marital privileges to only those crimes committed against the other spouse, but includes certain crimes against children as crimes against the spouse.174 Other states have chosen to only deal with a spouse's competency to testify, while still others have chosen to adopt an exception for crimes committed against a child over whom either spouse is a guardian.¹⁷⁵ The problem with this wide variety of approaches is deciding which type of exception would solve the problem at hand and would be justified by military needs.

A. State Exceptions to the Marital Privileges

1. The Exception For Crimes Against a Spouse, a Child of Either, or Persons Residing in the Home

This broad exception to the martial privileges prevents the application of such privileges when a spouse has committed an offense against the other spouse, a child of either spouse, or against any other person residing in the home.¹⁷⁶ Only a few states have, however, clearly

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¹⁷² See discussion infra Part III.A.1.

¹⁷³ See discussion infra Part III.A.2.

¹⁷⁴ See discussion infra Part III.A.3.

¹⁷⁵ See discussion infra Parts III.A.4-5.

¹⁷⁶ See, e.g., ARK. CODE ANN. § 16-41-101 (Michie 1999) (adopting the Uniform Rules of Evidence for proceedings in state courts; Rule 504(d) created an exception to the husbandwife privilege when "one spouse is charged with a crime against the person or property of (1) the other, (2) a child of either, (3) a person residing in the household of either"); CAL. EVID. CODE § 972(e)(1) (West 1995) (creating an exception to the adverse testimonial privilege during a criminal proceeding when a spouse is charged with "[a] crime against the person or property of the other spouse or of a child, parent, relative, or cohabitant of either"); OKLA. STAT. tit. 12, § 2504(D) (1993) (providing that there is no privilege when a spouse is charged with a "crime against the person or property of: (1) the other; (2) a child of either; (3) a person residing in the household of either"); S.D. CODIFIED LAWS § 19-13-15 (Michie 1995) (establishing that there is no confidential communications privilege when a spouse is charged with a "crime against the person or property of (1) the other, (2) a child

indicated what children were meant to be included in the phrase "a child

of either, (3) a person residing in the household of either"); ALA. R. EVID. 504(d)(3) (establishing that there is no exception to the husband-wife privilege in "a criminal action or proceeding in which one spouse is charged with a crime against the person or property of (A) the other spouse, (B) a minor child of either, (C) a person residing in the household of either"); DEL. R. EVID. 504(d) (specifying that there is no privilege when a "spouse is charged with a wrong against the person or property of (1) the other, (2) a child of either, (3) a person residing in the household of either"); HAW. R. EVID. 505(c)(1) (eliminating the spousal privilege when a spouse commits a crime "against the person or property of (A) the other, (B) a child of either, (C) a third person residing in the household"); IDAHO R. EVID. 504(d)(2) (creating an exception to the husband-wife privilege in criminal proceedings "in which a spouse is charged with a crime against the person or property of (A) the other spouse, (B) a person residing in the household of either spouse"); Ky. R. EVID. 504 (creating an exception to both the adverse testimonial privilege and the confidential communications privilege when a spouse is charged with an offense against "(A) The other; (B) A minor child of either; (C) An individual residing in the household of either . . . The court may refuse to allow the privilege in any other proceeding if the interests of the minor child of either spouse may be adversely affected"); ME. R. EVID. 504(d) (designating there is no husband-wife privilege in proceedings where a spouse is charged "with a crime against the person or property of (1) the other, (2) a child of either, (3) any person residing in the household of either"); MISS. R. EVID. 504(d) (indicating there is no husband-wife privilege when a spouse is charged with "a crime against (1) the person of any minor child or (2) the person or property of (i) the other spouse, (ii) a person residing in the household of either spouse"); N.D. R. EVID. 504(d) (specifying that there is no privilege when a "spouse is charged with a crime against the person or property of (1) the other, (2) a child of either, (3) a person residing in the household of either"); TEX. R. EVID. 504(a)(4)(C)-(b)(4)(A) (establishing there is no confidential communications privilege or adverse testimonial 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"); UTAH R. EVID. 502(c) (indicating there is no confidential communications privilege in any proceeding where a "spouse is charged with a crime or tort against the person or property of (i) the other, (ii) a child of either, (iii) a person residing in the household of either"); VT. R. EVID. 504(d) (providing that there is no confidential communications privilege when a spouse is charged with a crime "against the person or property of (1) the other, (2) a child of either, (3) a person residing in the household of either"); Rhode Island v. Angell, 405 A.2d 10, 15-16 (R.I. 1979) (finding that § 12-17-10 altered the common-law confidential communications privilege to allow a spouse to testify to confidential communications not involving a crime against the spouse or a child of either); cf. S.C. CODE ANN. § 19-11-30 (Law. Co-op. Supp. 2000) (establishing an exception to the confidential communications privilege by requiring a spouse to disclose confidential communications when the "suit, action, or proceeding concerns or is based on 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"). But see W. VA. CODE § 57-3-4 (1997) (prohibiting a spouse from testifying about confidential communications). One reason for the popularity of this broad exception is the growing concern for the prevention of crimes against children. See Fisher v. Mississippi, 690 So. 2d 268, 269, 272 (Miss. 1996) (amending Rule 504(d) because of the "growing concern about sexual and violent abuse against children" in a case where an uncle was charged with raping his eleven-year-old niece).

of either spouse." For purposes of this exception, Alabama's Advisory Committee clearly expressed its intent that the term "child" was not intended to be limited to a natural child. The Committee specifically referred to Daniels v. State, 178 which established a general policy of construing such privileges narrowly, especially in cases of child abuse. The court found the phrase "child of either spouse" was sufficiently broad enough to include those crimes committed against foster children. The court reasoned that the promotion of family harmony must yield to the policy of preventing child abuse because the court found there was not a good reason to limit the protection of children to only adopted or natural children. 181

In Munson v. State, 182 the Supreme Court of Arkansas addressed the meaning of the word "reside" as used in the Arkansas statute. 183 The

¹⁷⁷ ALA. R. EVID. 504(d)(3) (advisory committee's note).

^{178 681} P.2d 341 (Alaska Ct. App. 1984).

¹⁷⁹ Id. at 345. The Daniels' foster child, a thirteen-year-old girl, had only lived with them for about two and a half months. Id. at 342. The court also relied on cases from Washington state which further narrowed the privilege. Id. at 344; see also infra notes 231-34 and accompanying text.

¹⁸⁰ Daniels, 681 P.2d at 345; see also infra note 193 (providing the text of Alaska's exception). Mrs. Daniels argued that Alaska's exception should only apply to natural or adopted children. Daniels, 681 P.2d at 343. The court noted that neither the text of the rule nor the commentary clarified what children were intended to be included in the phrase "a child of either." Id. The state argued that the placement of a foster child in a licensed foster home created a legal relationship between the foster parents and the foster child. Id.

¹⁸¹ Id. at 345. In Dunn v. Superior Court of Orange County, the court found that considering a foster child as a "child of either" was consistent with the legislative intent because allowing the privilege to shield those foster parents killing or abusing children would conflict with the foster care's goal of protecting children. 26 Cal. Rptr. 2d 365, 367 (Cal. Ct. App. 1994). The court indicated no other California case had dealt with the issue of whether a foster child was a "child" for purposes of applying the privilege and that the legislative history on this issue was silent. Id. at 366. The court reasoned that "many foster parents develop close, loving personal relationships with their charges" and that in those circumstances injury to the child by a spouse would be harmful to the marriage. Id. Even if foster parents viewed the relationship as a business deal, harm to the foster child would not promote marital harmony. Id. Furthermore, the length of the residence was not determinative since once the spouses entered the formal agreement they created a sufficient relationship for purposes of this exception. Id. at 367. Even if the court had not found the foster child to be a child of either, the child would have been protected under the cohabitant exception. Id. at 368; see also California v. Siravo, 21 Cal. Rptr. 2d 350, 353 (Cal. Ct. App. 1993) (rejecting the argument that cohabitant implies sexual relations and instead found the "appropriate definition of cohabitants in this case is two people who live or dwell together in the same household").

^{182 959} S.W.2d 391, 393 (Ark. 1998).

victim, Mrs. Munson's fourteen-year-old sister, had been visiting the Munson home for about a week when she was attacked by the defendant. The defendant moved to suppress certain letters he had written to his wife in which he had reminded her of their wedding vows, asked her for her forgiveness, and admitted that he had made a mistake but that it was not entirely his fault. Utilizing accepted rules of statutory construction, the court determined the word "reside" was meant to be interpreted based upon the purpose of the statute. In the context of Rule 504, "reside" was found to apply to the circumstances of this case because the victim's temporary "residence" in that home would have presented the same opportunity to the defendant had she intended to remain indefinitely.

Similarly, in *Huddleston v. State*, ¹⁸⁸ the Texas Court of Appeals refused to apply the marital privileges where the husband was accused of raping a ten-year-old child. ¹⁸⁹ The statute specifically recognized that there was an exception to the husband-wife privilege when "an accused is charged with a crime against the person of any minor child or any member of the household of either spouse." ¹⁹⁰ The defendant had argued that the phrase "of either spouse" modified "any minor child." ¹⁹¹ The court, however, rejected this argument finding instead that the statute made it clear that the exception applied to any minor child, not simply "a child of either spouse." ¹⁹²

¹⁸³ Id. at 392. The court defined the issue as whether the victim was "residing" at the home at the time of the offense. Id.

¹⁸⁴ Id.

¹⁸⁵ Id.

¹⁸⁶ Id. at 393.

¹⁸⁷ Id.

^{188 997} S.W.2d 319 (Tex. App. 1999).

¹⁸⁹ Id. at 321. The victim testified that the appellant had convinced her to accompany him to his house where she could earn money by washing dishes. Id. at 320. After she finished washing the dishes, the appellant grabbed her, taped her mouth, and then raped her. Id. ¹⁹⁰ Id.

¹⁹¹ Id. If the court had accepted this argument, the result would have been that the appellant's wife was unable to testify because the victim was not a child of the appellant or his wife. Id.

¹⁹² Id. at 321. The appellant's argument would have resulted in the conclusion that the exception did not apply if the victim was not a child of either spouse. Id. This same argument, but for a prior statute, was addressed in Ludwig v. State. 931 S.W.2d 239 (Tex. Crim. App. 1996). In that case, the court also found that the exception applied even if the child was not a child of either spouse. Id. at 244. The court relied on the legislative history

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2. The Exception For Crimes Against the Spouse or a Child of Either

Another common exception to the marital privileges is for crimes committed against either the spouse or "a child of either spouse." 193

to conclude that the exception to the confidential communications privilege was not meant to only protect children of either spouse. *Id.*

193 See, e.g., CAL. EVID. CODE § 985(a) (West 1995) (stating there is no confidential marital communications privilege when one spouse is charged with "[a] crime committed at any time against the person or property of the other spouse or a child of either"); FLA. STAT. ANN. § 90.504(3)(b) (West 1999) (establishing 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 confidential 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"); LA. CODE EVID. ANN. art. 504(C)(1) (West 1995) (creating an exception to the confidential communications privilege "[i]n a criminal case in which one spouse is charged with a crime against the person or property of the other spouse or of a child of either"); 2000 Mich. Legis. Serv. 128 (West) (stating that "a husband shall not be examined as a witness for or against his wife without her consent or a wife for or against her husband without his consent, except as [follows]: . . . In a prosecution for a crime committed against a child of either or both" or where a spouse commits a personal wrong or injury against the other); NEB. REV. STAT. 27-505(3)(a) (1995) (creating an exception to the confidential communications privilege when a crime is committed against a "child of either"); N.C. GEN. STAT. § 8-57(b)(5)-(c) (1999) (specifying that "[i]n 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" the spouse is competent and may be compelled to testify but shall not be compelled "to disclose any confidential communication" made during the marriage); OHIO REV. CODE ANN. § 2945.42 (Anderson 1997) (indicating a spouse "shall not testify concerning a communication made by one to the other" unless in the case of an offense against the spouse for cruelty to their children); OR. REV. STAT. § 40.255(4)(a) (1999) (denoting that there is no husband-wife 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"); VA. CODE ANN. § 19.2-271.2 (Michie 2000) (establishing a spouse may be compelled to be a witness against the other spouse in prosecutions for crimes against the spouse or a child of either but may not testify to privileged communications); WIS. STAT. ANN. § 905.05(3)(b) (West 2000) (indicating there is no confidential communications privilege when a spouse is charged "with a crime against the person or property of the other or of a child of either"); ALASKA R. EVID. 505(a)(2)(D)(i), 505(b)(2)(A) (establishing that there is no adverse testimonial privilege or confidential communications privilege when one spouse is charged with a "crime against the person or the property of the other spouse or of a child of either"); N.M. R. EVID. 11-505(D) (indicating there is no husbandwife 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"). Under Colorado's exception for crimes against the spouse, the courts have found that an offense committed against the spouse includes various crimes against children or step-children. See, e.g., Jordan v. People, 419 P.2d 656, 661 (Colo. 1966) (finding indecent liberties against the wife's child, the defendant's step-child, was a crime against the wife); Balltrip v. People, 401 P.2d 259, 263 (Colo. 1965) (finding the murder of a spouse's child also constituted an offense against the

However, various states have interpreted the meaning of "a child of either spouse" differently. Alaska has, for example, interpreted the phrase "a child of either spouse" to include foster children.¹⁹⁴ The court adopted this interpretation because it believed that there was no good reason for a foster child to not have the same protection as a natural or adopted child.¹⁹⁵

Conversely, in *People v. Clarke*, ¹⁹⁶ the Supreme Court of Michigan refused to allow a spouse to testify against the other spouse in a prosecution for a crime committed against a child who was not "a child of either spouse." The defendant was accused of taking indecent liberties with a child who was not a child of either spouse. The court did not find the crime to be either an offense against the wife or an offense against "a child of either spouse." The court believed that the legislature's intent, when it amended the statute to allow a spouse to sign a complaint in an action involving a crime against the spouse or a child of either, was not to change the law by allowing a spouse to sign such complaints in actions involving children who were not "a child of either spouse." The court reasoned that, as a matter of public policy, the statute's purpose was to protect confidential communications. The exception to the privileges was only designed to permit the prosecution

spouse making the marital privilege inapplicable). Louisiana has not adopted any exceptions to the adverse testimonial privilege because the privilege may not be exercised by the defendant, although the confidential communications privilege allows the defendant to bar the victim spouse from testifying. State v. Taylor, 642 So. 2d 160, 165-66 (La. 1994).

¹⁹⁴ See supra notes 178-81 and accompanying text.

Daniels v. State, 681 P.2d 341, 345 (Alaska Ct. App. 1984); see also State v. Michels, 414 N.W.2d 311, 316 (Wis. Ct. App. 1987) (finding a foster child to be a "child of either" in order to prevent crimes within the family from going unpunished because the purpose of such an exception is to protect minor children who are part of the family structure from criminal acts).

^{196 114} N.W.2d 338 (Mich. 1962).

¹⁹⁷ *Id.* at 340. The defendant was accused of taking indecent liberties with an eleven-year-old girl who had lived with the Clarkes since shortly after her birth. *Id.* at 339. The wife signed the complaint upon which the arrest warrant for the defendant was based. *Id.*

¹⁹⁶ Id. The wife testified that the victim was not her child and that she was not sure if the defendant had legally adopted the victim, but she thought the defendant was the victim's father. Id. The defendant denied being the father of the victim. Id.

¹⁹⁹ ld.

²⁰⁰ Id. at 340.

²⁰¹ Id.

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of crimes committed within the family unit because such crimes would have no other witnesses and would therefore go unpunished.²⁰²

3. The Exception For Crimes Committed Against the Other Spouse

Some states have chosen to establish an exception only for those offenses that are committed against one spouse by the other.²⁰³ Inevitably, these states have developed differing interpretations of what constitutes an offense against a spouse. For example, in State v. Ulin,²⁰⁴ the Arizona Supreme Court recognized an exception to both marital privileges "whenever the testifying spouse's child or relative is endangered by the other spouse."²⁰⁵ The court recognized that although prior cases had only recognized such an exception for the adverse testimonial privilege, the same reasoning applied to the confidential communications privilege.²⁰⁶ In a prior case, the Arizona Supreme Court had reasoned that when a spouse commits a crime that so intimately

²⁰² Clarke, 114 N.W.2d at 340.

²⁰³ See, e.g., ARIZ. REV. STAT. ANN. § 13-4062(1) (West 2001) (providing that a spouse shall not be examined against his or her spouse without the other spouse's consent, as to events or communications occurring during the marriage, but that these exceptions will not apply in a "criminal action or proceeding for a crime committed by the husband against the wife, or by the wife against the husband"); COLO. REV. STAT. ANN. § 13-90-107(1)(a)(l) (West Supp. 2000) (creating an exception to the confidential communications privilege in criminal proceedings where a spouse is charged with a crime against the other spouse); CONN. GEN. STAT. § 54-84a (1994) (establishing that a husband or wife whose spouse committed a violent act against him or her may be compelled to testify as any other witness); MASS. GEN. LAWS ch. 233, § 20 (2000) (establishing a spouse may not testify to confidential communications unless the spouse is accused of committing a crime against the other spouse"); MONT. CODE ANN. § 26-1-802 (1999) (providing that a spouse may testify against another spouse "for a crime committed by one against the other"); WYO. STAT. ANN. §§ 1-12-101, 104 (Michie 1999) (establishing that a spouse may not testify to confidential communications "except in criminal proceedings for a crime committed by one against the other"); see also State v. Littlejohn, 508 A.2d 1376, 1387 (Conn. 1986) (stating that the Supreme Court of Connecticut had "never explicitly held that confidential communications between husband and wife were privileged under the common law" of that jurisdiction). 204 548 P.2d 19 (Ariz. 1976).

ld. at 23. In Ulin, the husband had committed second-degree murder of his wife's daughter, his step-daughter. Id. On August 29, 1974, the defendant could not find his comb. Id. at 20. When his wife's daughters were unable to find the comb, the defendant physically punished the girls and then made them spend the rest of the day in bed. Id. Later that day, the defendant went to the girl's room and found the victim had wet her bed. Id. He became extremely upset and hit the victim with such force that she urinated and had a bowel movement. Id. A few hours later the victim was found unconscious and taken to the hospital where she died from head injuries. Id. at 20-21.

affects the other spouse as to violate the marriage, the reason for the rule and its protection were inapplicable.²⁰⁷

In State v. Howell,²⁰⁸ however, the New Mexico Court of Appeals declined to determine whether such an exception could be interpreted to include an offense against a child to whom a spouse has an in loco parentis relationship.²⁰⁹ The court defined "in loco parentis" as those circumstances where a person was placed in the situation of a parent by intentionally assuming the obligation of being a parent but without going through a formal adoption.²¹⁰ The court found that Mrs. Howell's relationship with the victim was no more than that of a baby-sitter and that she had not intended to assume the status of parent to the child.²¹¹ Consequently, the court found there was no reason to determine whether she had been acting in loco parentis and, therefore, whether her testimony would have been privileged.²¹² The court refused to adopt an

²⁰⁷ State v. Crow, 457 P.2d 256, 263 (Ariz. 1969); see also State v. Whitaker, 544 P.2d 219, 224 (Ariz. 1975) (finding that because the wife and her child were potential victims of the defendant's assault her testimony was admissible); O'Loughlin v. People, 10 P.2d 543, 546-47 (Colo. 1932) (allowing a husband to testify against his wife who was charged with killing her step-daughter because the purpose of the rule and its protection were eliminated by the murder); Chamberlain v. State, 348 P.2d 280, 284 (Wyo. 1960) (reasoning that the rape of a wife's daughter by her husband was an offense against the wife because the crime against her daughter "undoubtedly caused as great or, more likely, even greater pain and suffering to the mother" than any violence against the wife). Even Professor Wigmore stated that in a liberal view any injury to a spouse's child was a wrong to the spouse and thus made the spouse's testimony admissible. 3 WIGMORE ON EVIDENCE, supra note 49, § 2239, at 3060.

^{208 596} P.2d 277 (N.M. Ct. App. 1979).

²⁰⁹ Id. at 278. The defendant's wife cared for the victim for four and a half hours a day, five days a week, while the victim's mother attended school. Id. After the victim's mother found a very large bruise on the victim's buttocks, she reported the bruise to the police. Id. When the police questioned the defendant's wife, her statement allowed an inference that the defendant was responsible for the bruise. Id. The defendant was then charged with child abuse. Id. at 277.

²¹⁰ Id. at 278. In loco parentis occurs when a person "puts himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formalities necessary to a legal adoption However, the person must intend to assume toward the child the status of the parent." Id. The State argued that the defendant's wife was acting as in loco parentis to the child because she had acted as the child's mother. Id. The defendant's wife had fed the victim, attended to the victim's medical needs, loved the victim, and given the victim attention and chastisement, but the court found these acts were insufficient to characterize the relationship as in loco parentis. Id

²¹¹ ld.

²¹² Id. at 277.

argument that such an extension to the exception to the martial privileges should be adopted on grounds of necessity.²¹³

4. Statutes Only Dealing With a Spouse's Competency to Testify

Some states have created statutes dealing only with a spouse's competency to testify.²¹⁴ For example, in criminal proceedings in the District of Columbia, a spouse is not competent to testify to any confidential communications.²¹⁵ This incompetency is not an absolute bar to testimony regarding confidential communications because in

²¹³ *Id.* The State argued that the privilege should be narrowly construed and that exceptions to the privilege should be broadly interpreted. *Id.* The court refused to apply this theory because the court was bound to follow the evidentiary rules that had been adopted by the New Mexico Supreme Court. *Id.* at 279. The court characterized its role as determining whether the privilege is applicable but found insufficient facts to raise an issue about the applicability of this exception. *Id.*

²¹⁴ D.C. CODE ANN. § 14-306(b) (1995) (indicating that in criminal proceedings "a husband or his wife is not competent to testify as to any confidential communications made by one to the other during the marriage"); see also IND. CODE § 34-46-3-1 (1999) (specifying that a spouse is not required to testify about communications made to each other); IOWA CODE ANN. § 622.9 (West 1999) (stating that "[n]either husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted"); MD. CODE ANN., CTS. & JUD. PROC. § 9-105 (1998) (providing that "[o]ne spouse is not competent to disclose any confidential communication between the spouses occurring during their marriage"); Mo. ANN. STAT. §§ 546.260(1-2) (West 1987) (specifying a spouse may testify at his or her option but may not "disclose confidential communications had or made between them in the relation of such husband and wife"); N.Y. C.P.L.R. 4502 (McKinney 1992) (stating a "husband or wife shall not be required, or, without consent of the other if living, allowed, to disclose a confidential communication made by one to the other during marriage"); R.I. GEN. LAWS § 12-17-10.1 (2000) (stating that a spouse may be ordered to testify against the defendant in cases of abuse against the spouse or a child of either); W. VA. CODE § 57-3-3 (1997) (prohibiting a spouse from testifying against a spouse except where the spouse is charged with an offense against the spouse or the "child, father, mother, sister or brother of either of them"); N.H. R. EVID. 504 (establishing a spouse shall not be "allowed in any case to testify to any matter which in the opinion of the court would lead to a violation of marital confidence"). Rhode Island's statute has been interpreted to allow a spouse to voluntarily testify to confidential communications between the spouses. State v. Angell, 405 A.2d 10, 15-16 (R.I. 1979). Although Indiana has recognized the confidential communications privilege, it does not recognize the adverse testimonial privilege. State v. Roach, 669 N.E.2d 1009, 1010 (Ind. Ct. App. 1996). Although New York has established that confidential communications shall not be disclosed, the courts have created an exception to this privilege by finding an offense against a child of a spouse also constitutes an offense against that spouse. People v. Allman, 41 A.D.2d 325, 328 (N.Y. App. Div. 1973).

Johnson v. United States,²¹⁶ the Court of Appeals for the District of Columbia recognized an exception based on necessity that allows a spouse to testify to confidential communications when a crime has been committed against the spouse or a child of either spouse.²¹⁷ The court reasoned that such an exception had already been judicially recognized to the adverse testimonial privilege, and therefore, it necessarily followed that such an exception to the confidential communications privilege was proper.²¹⁸ The court's rationale for this exception to the confidential communications privilege was that any other result would give a spouse the license to injure the other spouse in secret with full immunity.²¹⁹ The court further reasoned that because the necessity exception already prevented the martial privileges from silencing an injured spouse, it should also prevent the privileges from silencing the only person who can communicate on behalf of an injured child.²²⁰

Similarly, Missouri's statute establishing that a spouse may not testify to confidential communications is also subject to exceptions for offenses committed against the spouse and for offenses committed against a child of either, as any crime committed against a child of the family is the equivalent of an offense against the spouse.²²¹ Missouri has

^{216 616} A.2d 1216 (D.C. 1992).

²¹⁷ Id. at 1220. In Johnson, the defendant was charged with the murder of his eight-month old daughter. Id. at 1218. When the defendant's common law wife returned from work she noticed a bruise on the baby's right temple. Id. Her husband told her that the baby had fallen off the bed. Id. Later that same night, he took the baby into the bathroom where he smacked her for two or three minutes with a belt because she kept crying. Id. Expert medical evidence indicated the baby's death was caused by blunt force to the head. Id. at 1219 n.5; see also Morgan v. United States, 363 A.2d 999, 1004 (D.C. 1976) (recognizing confidential communications about injuries to one spouse by the other spouse are admissible as a necessity).

²¹⁸ See Johnson, 616 A.2d at 1224; see also United States v. Allery, 526 F.2d 1362, 1367 (8th Cir. 1975). While recognizing that the "marital confidential communications privilege is almost sacrosanct" the court reasoned that "it would be illogical for the court to conclude that the privilege is not a bar when the husband inflicts an injury on the wife" but is a bar when the husband kills their child. Johnson, 616 A.2d at 1224.

²¹⁹ Johnson, 616 A.2d at 1225.

²⁰⁰ *Id.* The court reasoned that to the extent that parents are the persons most likely to witness a crime against their children, the criminal who kills his or her own children would have greater immunity because the killer could silence the spouse through application of the marital privilege. *Id.* The court also indicated that allowing such testimony would not likely harm the marriage because the marriage was most likely already in a state of disrepair and preventing the testimony would more likely frustrate justice than promote family peace. *Id.*

²²¹ State v. Brydon, 626 S.W.2d 443, 453 (Mo. Ct. App. 1981).

further extended this exception to include foster children because the Supreme Court of Missouri found that foster children logically fall within the same family structure as children of either spouse.²²²

5. Exception For Offenses Committed Against a Child of Either or Children in Their Care

Some states have expanded the exception to the marital privileges for crimes against "a child of either spouse" to specifically include offenses committed against children who are in the care or custody of either spouse.²²³ The justification for this exception is that the reasons for

²²² Id. The defendant and his wife were foster parents to a fifteen-year-old girl. Id. at 446. The girl and her brother had lived with the Brydons for three years. Id. After the victim reported the defendant engaged in unwanted sexual intercourse, the defendant's wife telephoned a private counselor to seek professional counseling. Id. at 446-47. The defendant, his wife, and the foster child visited the therapist where they were informed that she "would have to report this." Id. at 446. The defendant then indicated that he "felt badly about the situation," was concerned about the foster child, and felt he needed counseling. Id. Thereafter, the counselor reported the abuse to Family Services. Id. 233 GA. CODE ANN. §§ 24-9-23(a-b) (1995) (establishing a spouse is "competent, but not compellable, to give evidence against the other spouse in a criminal proceeding" but that such privilege "shall not apply in proceedings in which the husband or wife is charged with a crime against the person of a minor child, but such person shall be compellable to give evidence only on the specific act for which the defendant is charged"); 725 ILL. COMP. STAT. 5/115-16 (West 2001) (establishing a spouse may testify to confidential communications in cases where a spouse is "charged with an offense against the person or property of either . . . 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 of either or against a child under the care of either spouse"); NEV. REV. STAT. ANN. 49.295(2)(e)(1) (Michie 1996) (indicating there is no marital privileges in a "[c]riminal proceeding in which one spouse is charged with: A crime against the person or 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. STAT. ANN. § 2A:84A-17 (West 1994) (requiring a spouse to testify to criminal actions "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"); 42 PA. CONS. STAT. ANN. § 5913(2) (West 2000) (establishing that there is no adverse testimonial privilege "in any criminal proceeding against either 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"); 42 PA. CONS. STAT. ANN. § 5914 (West 2000) (refusing to allow the disclosure of confidential communications unless the privilege is waived); TENN. CODE ANN. § 24-1-201(c)(2) (2000) (creating an exception to the inadmissibility of confidential communications in proceedings concerning the abuse of a spouse "or abuse of a minor in the custody or under the dominion and control of either spouse"); WASH. REV. CODE ANN. § 5.60.060(1) (West 1995)

admitting confidential marital communications regarding crimes committed against such children outweigh the justifications for the existence of such a privilege.²²⁴ Furthermore, maintaining the confidentiality of communications regarding violent acts in order to foster a stronger marriage directly conflicts with the rational norms of a family oriented society because the benefits of exposing such abuse clearly outweigh any injury the disclosure of such communications would cause the marriage.²²⁵

In People v. Burton,²²⁶ the defendant was accused of engaging in incestuous acts against his two stepdaughters.²²⁷ The issue in Burton was whether the defendant's trial for incest could be classified as a case where the interests of the children were directly involved. If not, then the marital privileges would apply and the wife would not be able to testify against her husband.²²⁸ The Illinois Court of Appeals considered it irrelevant that the victims were the defendant's stepchildren, finding instead that the exception was designed to protect all children within the family relationship and to only protect natural children would violate

(creating an exception to the confidential communications privilege when a spouse commits a crime against the other spouse or when a spouse commits a crime against "any child of whom said husband or wife is the parent or guardian"). Pennsylvania's statutes have been interpreted as meaning the "spousal privilege simply does not exist in criminal proceedings where violence has been done or threatened upon a minor child in the care of custody of the spouse/defendant." Commonwealth v. Hancharik, 565 A.2d 782, 786-87 (Pa. Super. Ct. 1989). The court found that the purpose of this exception was to protect both spouses and children from domestic violence. *Id.* at 786. The court then reasoned that this protective policy clearly outweighed the marital harmony justification of preventing the disclosure of confidential marital communications. *Id.*

²²⁴ See Adams v. State, 563 S.W.2d 804, 809 (Tenn. Crim. App. 1978). The defendant was convicted of the first degree murder of his four-year-old step-son. *Id.* at 805. The victim was reported missing on August 17, 1975, which resulted in a massive search for the boy. *Id.* The boy's body was found three days later at the bottom of a steep grade. *Id.* The victim had died as the result of a severe beating and had suffered numerous injuries to the head. *Id.* The defendant's wife testified that the defendant beat the boy after he vomited at the table while the defendant was eating. *Id.* at 806.

Id. at 809. The court noted the growing number of jurisdictions recognizing the need to protect children outweighed the policy of protecting marital relationships. Id.
 429 N.E.2d 543 (Ill. App. Ct. 1981).

²²⁷ Id. at 545. At the time of trial the girls were eight and nine years old. Id. On a family vacation, the girls informed their mother about the defendant's behavior. Id. When the wife confronted the defendant, he denied the accusations and wanted to punish the girls. Id. The mother then insisted that they speak to the girls before punishing them. Id. When the girls repeated the same story in front of the defendant, the defendant asked his wife to go to another room where he admitted the girls were telling the truth. Id.

²²⁸ Id. at 546.

the legislative intent of protecting children.²²⁹ The court found that the interests of the girls were within the statute's purpose because society has a greater public policy concern in protecting children from sexual and physical abuse than preserving confidential marital communications about such acts.²³⁰

In addition, Washington addressed the issue of what constitutes a "guardian" in State v. Modest.²³¹ In Modest, the Washington Court of Appeals found the term "guardian" included those people who acted in loco parentis to a child, even for short periods of time.²³² The court indicated that although a determination of the existence of a guardianship relationship was based on the facts and circumstances of each case, the court must also consider the legislative intent to promote successful prosecutions of such behavior or treatment toward children.²³³

²²⁹ Id.

²³⁰ Id. at 547.

²³¹ 944 P.2d 417 (Wash. Ct. App. 1997). The defendant was accused of directing a prostitution ring while in the Yakima County Jail. *Id.* at 419. The defendant told his girlfriend, his wife at the time of trial, where to send the girls and herself, what clothes should be worn, what should be charged for various sexual acts, and to put the money into his jail account. *Id.*

²³² Id. at 421. The court stated that the "guardianship exception applies when any spouse acts in loco parentis, meaning when he or she assumes the parental character or discharges parental duties, even if for a very short time." Id. In State v. Waleczek, the Supreme Court of Washington stated that "a guardian, like a parent, ordinarily connotes a person in loco parentis." 585 P.2d 797, 800 (Wash. 1978). The court then defined in loco parentis as "one who means to put himself in the situation of a lawful parent to the child . . . one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental obligations without going through the formalities necessary to a legal adoption." ld. at 799. The court further indicated the legislature and public were concerned with the physical and sexual abuse of all children, not just certain situations of abuse. Id. at 799. The court found the defendant and his wife had voluntarily undertaken parental duties when they allowed the victim to sleep over at their house, waked her for school, gave her breakfast, and made sure she attended to school. Id. at 800-01; see also State v. Wood, 758 P.2d 530, 533 (Wash. Ct. App. 1988) (finding that a neighbor created a guardian relationship over a young child when the child simply played with the neighbor because "when an adult engages in play with another's child, he or she takes on a 'parental dut[y],' albeit one less onerous than others").

²³³ Modest, 944 P.2d at 421. The court found a liberal construction of the term guardian supported the application of this exception to this case. *Id.* The accused had determined who lived in the house with his wife. *Id.* He also directed the girls to pay his wife for being allowed to stay there, requested their attendance at the jail, ordered punishment via the telephone, and required them to follow his stringent rules. *Id.*; see also State v. Lounsbery, 445 P.2d 1017, 1020 (Wash. 1968) (describing the legislative intent as facilitating disclosure in child abuse cases, "so that the offenders might be punished and the children protected

Based on this concern for children, the court found that "guardian" should be liberally interpreted to punish child abusers and thus protect children.²³⁴

B. The Need for an Amended MRE 504(c)(2)(A)

The word "child" in MRE 504(c)(2)(A) can be interpreted as having several legitimate, yet fundamentally different, meanings. As written, the language of MRE 504(c)(2)(A) is unclear as to what is the exact meaning of "a child of either spouse." Not only does MRE 504(c)(2)(A) not contain a definition, but the drafter's analysis is also silent on this issue. One possible interpretation is that MRE 504(c)(2)(A) only provides an exception to the marital privileges when an offense is committed against children of whom one of the spouses is a biological parent. A second interpretation is to include adopted, or possibly even foster children, in the meaning of "a child of either spouse." A third plausible interpretation includes those children who have as a guardian one of the spouses. These interpretations are possible given that the statutory language does not specifically refer only to biological parents.

Furthermore, some military judges have utilized what appears to be a rather complex analysis when deciding whether a marital privilege is applicable under MRE 504(c)(2)(A) when an offense is committed against a child who is a not "a child of either spouse." Under this analysis, the court first determines whether the victim is a de facto child of either spouse; it then decides whether the offense against the de facto child also constitutes an offense against the spouse, in which case neither of the marital privileges apply. However, it is possible to interpret MRE 504(c)(2)(A) so that neither of the marital privileges is applicable once it is determined that the victim was a de facto child of a spouse, thus making the second determination unnecessary. If the victim is a de facto child of either spouse, then it would be easier to simply conclude that

from further mistreatment" and that limiting parent to only a natural or adoptive parent would frustrate such a purpose).

²³⁴ Modest, 944 P.2d at 421.

²³⁵ See MILITARY RULES, supra note 27, at 657.

²⁵⁶ There is no case on point but based on analogy to some of the other state laws, this is a permissible interpretation.

²⁹⁷ This interpretation has not yet been accepted by the military courts. See McElhaney, 50 M.J. 819, 830, n.6 (A.F. Ct. Crim. App. 1999); see also infra note 280 and accompanying text (explaining the meaning of in loco parentis).

See supra notes 160-169 and accompanying text.

neither privilege applies since the victim was "a child of either spouse." This analysis would produce the same result as a conclusion that the victim was a de facto child and that the offense against the child was also an offense against the spouse. Therefore, determining whether an offense against that child also constitutes a crime against the marriage needlessly complicates the analysis. As written, MRE 504(c)(2)(A) does not specify that crimes against a de facto child are an exception to the privileges, but neither does it make clear that such offenses are covered by the current exception. Both the unclear meaning of the phrase "a child of either spouse" and the complicated analysis could be remedied by a rule that clearly states what is meant by "a child of either spouse."

C. Justifications for Amending MRE 504(c)(2)(A)

First, Article 36 of the UCMJ gives the President the power to create regulations over courts-martial – subject to the limitation that evidentiary rules generally recognized in criminal cases in the United States district courts be applied as much as practicable.²³⁹ At this time, only the Tenth Circuit has decided to extend the exceptions to the marital privilege beyond that for crimes committed against the spouse or a child of either.²⁴⁰ However, the current trend in the area of privileges is to extend the exceptions to privileges.²⁴¹

Potentially, the current version of the rule may violate the Equal Protection Clause. MRE 504 might be unconstitutional if there is not a reasonable justification for allowing a spouse to testify to confidential communications concerning biological children while simultaneously refusing to allow the testimony of similar communications involving de facto children who are abused or even murdered. Although the classification, "a child of either spouse" versus all other children residing in the home is only subject to rational basis review, if the distinction is arbitrary or capricious it will nonetheless violate the Equal Protection

²⁵⁹ See supra note 33 and accompanying text. In addition, MRE 501(a)(4) provides for both the codified privileges and those generally recognized privileges "in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual." MIL. R. EVID. 501(a)(4).

²⁴⁰ See supra notes 147-52 and accompanying text.

²⁴¹ See supra note 131 and accompanying text.

Clause, and therefore, be unconstitutional.²⁴² The purpose of the exception to the marital privileges for crimes involving children is to protect children from such abuse.²⁴³ Even military courts have indicated that, in "military life, child beating and child molestation by parents cannot be tolerated and certainly should not be facilitated by a rule of evidence."244 If such behavior is not to be tolerated by parents, then there is even less reason to accept such behavior from those people who are acting in loco parentis or as a guardian of a child. Therefore, it can be argued that it is illogical to protect only biological or adopted children when other children are in similar danger. To do so could result in a target population for abuse because the criminal spouse could always prevent his or her spouse from testifying to confidential communications concerning the abuse of children in the target population.²⁴⁵ This is especially important given the increasing number of children who are not living with their parents, but are living with some other relative, family friend, or in a foster home.246

Perhaps the most persuasive argument for amending the rule is the nature of military life. The military requires single parents and dual military families, those families with both parents in the military, to establish Family Care Plans on an annual basis.²⁴⁷ A Family Care Plan is

will only be "upheld if it is proven necessary to achieve a compelling government purpose." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 529 (1997). Discrimination based on gender or against non-marital or illegitimate children is subject to intermediate scrutiny. *Id.* Intermediate scrutiny requires a law to be upheld if the law is "substantially related to an important government purpose." *Id.* The distinction involved in MRE 504(c)(2)(A) is not based upon the legitimacy of the child but simply the fact that the child is not a biological child of either spouse. Therefore, MRE 504(c)(2)(A) is subject to rational basis. Any law not subject to strict or intermediate scrutiny is subject to rational basis. *Id.* Rational basis, the minimum level of scrutiny, only requires that a law be "rationally related to a legitimate government purpose." *Id.* Furthermore, "a law should be upheld if it is possible to conceive any legitimate purpose for the law, even if it was not the government's actual purpose." *Id.* at 535. The burden of proving the law is irrational is on the challenger and because the test is so deferential to the government, laws are rarely found invalid. *Id.* at 530.

²⁴³ See supra note 233 and accompanying text.

²⁴⁴ United States v. Menchaca, 48 C.M.R. 538, 540 (C.M.A. 1974).

²⁴⁵ See supra note 157 and accompanying text.

²⁴⁶ See supra note 3.

²⁴⁷ Appendix | - Family Care Plans, at http://www.wood.army.mil/ig/inspecto.htm# APPENDIX J (last visited Nov. 21, 2001); see also The Community and Well Being, at http://www.army.mil/aps/aps_ch5_4.htm (last visited Nov. 21, 2001) (stating that approximately 35,000 soldiers in the United States Army are single parents).

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the means by which a servicemember arranges for the care of his or her dependents, so that the servicemember is available for duty wherever and whenever military needs dictate, without the interference of family responsibilities.²⁴⁸ In essence, this means that the military requires, as part of military readiness, that servicemembers name someone they trust as a guardian for their child or children, so the servicemember can leave on a moment's notice. As a result, the military has created a special community of children who are residing in homes where the child is no longer "a child of either spouse." Because this requirement is based on the military's need for servicemembers to be able to entirely devote themselves to their military responsibilities, the military should extend the exception to the marital privilege to protect such children. This additional protection for children would help reduce any fears of servicemembers that their child could be subject to abuse without the perpetrator being prosecuted simply because a spouse is ineligible to testify. Ideally, servicemembers are able to trust that whomever they have entrusted with their children would treat the children as if they were family. However, given the current statistics of child abuse and neglect, a servicemember can still reasonably fear for the safety of his or her children.

Regardless of whether a spouse is taking care of another servicemember's child or a member of his or her own family, an offense against that child will likely create havoc in the marital relationship due to the violation of trust or destruction of the spouse's expectations of their spouse.²⁴⁹ Such havoc could even destroy the marital relationship because of the violation of trust. When a spouse commits an offense against a child who, for any variety of reasons, has become part of the family, such an offense becomes more like a crime against the spouse. This happens because the spouse was responsible for protecting that child and when that protection is breached, that spouse considers such an offense to be an affront to that spouse because of the violation of their expectations and beliefs. Therefore, to enact such an amendment would, if not protect children from abuse, at least vindicate their rights because a spouse would be eligible to testify against the abusive spouse. In turn, this would help ensure that servicemembers are focused on their military duties and would not allow the marital relationship to act as a shield

²⁴⁸ Appendix J - Family Care Plans, at http://www.wood.army.mil/ig/inspecto.htm# APPENDIX J (last visited Nov. 21, 2001).

²⁴⁹ See supra notes 97-98 and accompanying text.

against prosecution for crimes that in all likelihood might not survive such offenses.

Although Allery limited the exceptions for the adverse testimonial privilege to offenses against a spouse or a child of either, the reasoning in Allery supports the proposed extension of the exception to the marital privileges.²⁵⁰ The court examined five factors in determining, that based on "reason and experience," the exception to the adverse testimonial privilege should be extended.²⁵¹ First, the court reasoned that a serious crime against a child is an offense against family harmony, which the privilege was designed to protect.²⁵² This offense to family harmony does not fail to exist simply because a spouse has committed a horrendous crime against a non-biological child rather than a biological child. This is true because it would be a shock to a spouse when he or she discovers the capability of their spouse to commit such acts. Consequently, a balance of the protection of the integrity of marriage with society's interest in justice, leads to the conclusion that society's interest in administering justice outweighs the interest in protecting marriages.²⁵³ If a spouse is "properly outraged" by the other spouse's conduct, it makes no sense to prohibit that spouse from testifying against the abuser based on a privilege that promotes trusting and loving communications.254

The second justification is that parental testimony is necessary for child abuse prosecutions.²⁵⁵ Even the Supreme Court has recognized the difficulty of prosecuting child abuse because usually the only witness to the crime is the child.²⁵⁶ This difficulty is not reduced simply because the victim is not a biological child of the abuser, as the abuser is generally a close and trusted family member.²⁵⁷ To allow a spouse to testify only

²⁵⁰ See supra notes 137-142 and accompanying text. In extending these exceptions to the confidential communications privilege in White, the court also relied upon the reasoning of Allery. See United States v. White, 974 F.2d 1135, 1138 (9th Cir. 1992).

²⁵¹ See United States v. Allery, 526 F.2d 1362, 1366-67 (8th Cir. 1975).

²⁵² See supra note 142.

²⁵³ See supra note 145 and accompanying text.

²⁵⁴ See supra note 152 and accompanying text.

²⁵⁵ See supra note 142.

²⁵⁶ See supra note 2.

²⁵⁷ See supra note 2.

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about offenses to biological children could create a target population consisting solely of non-biological children.²⁵⁸

Third, any rule impeding the discovery of truth still impedes justice, regardless of who the victim may be.²⁵⁹ Fourth, several state courts have recognized such an exception.²⁶⁰ Moreover, many states have adopted an even broader exception covering any minor child or any person residing in the household.²⁶¹ The Tenth Circuit has also recognized an exception to the confidential communications marital privilege "for crimes committed against a minor relative in the defendant's household.²⁶² Fifth, at that time *Allery* was decided, eleven states had passed statutes making the privilege inapplicable in cases of child abuse and neglect.²⁶³ Currently, such a statute or a similar statute has been almost unanimously adopted by the states.²⁶⁴

²⁵⁸ See supra note 157 and accompanying text.

²⁵⁹ See supra note 142.

²⁶⁰ See supra note 142.

²⁶¹ See supra note 176 and accompanying text.

²⁶² See supra notes 147-52 and accompanying text.

²⁶³ See supra note 142.

See, e.g., ALA. CODE § 26-14-10 (1975) (establishing the "doctrine of privileged communication ... shall not be a ground for excluding any evidence regarding a child's injuries or the cause thereof in any judicial proceeding resulting from a report pursuant to this chapter"); ALASKA STAT. § 47.17.060 (Michie 2000) (providing the husband-wife privilege is not a ground for "excluding evidence regarding a child's harm, or its cause, in a judicial proceeding related to a report made under this chapter"); ARIZ, REV. STAT. ANN. § 13-3620(G) (West 2001) (indicating that the confidential communications privilege "shall not pertain in any civil or criminal litigation or administrative proceeding in which a child's neglect, dependency, abuse . . . is an issue"); ARK. CODE ANN. § 12-12-518(1) (Michie 1999) (establishing the confidential communications privilege is not "grounds for excluding evidence at any proceeding regarding child abuse, sexual abuse, or neglect"); CAL. EVID. CODE § 985(d) (West 1995) (creating an exception to the confidential communications in criminal proceedings for the neglect of a person's child); COLO. REV. STAT. ANN. § 18-6-401.1 (West 1999) (indicating the husband-wife privilege "shall not be available for excluding or refusing testimony in any prosecution of an act of child abuse"); DEL CODE ANN. tit. 16, § 909 (Supp. 2000) (indicating that the husband-wife privilege shall not apply to situations of child abuse or neglect); D.C. CODE ANN. § 2-1355 (2000) (establishing the husband-wife privilege is not grounds for excluding evidence "concerning the welfare of a neglected child; provided, that a judge . . . determines such privilege should be waived in the interest of justice"); Fla. STAT. ANN. § 39.204 (West Supp. 2001) (abrogating the confidential communications privilege for "any communication involving the perpetrator or alleged perpetrator in any situation involving known or suspected child abuse . . . or neglect"); GA. CODE ANN. §§ 24-9-23(a-b) (1995) (compelling a spouse to provide evidence against his or her spouse but "only on the specific act for which the defendant is charged"); HAW. REV. STAT. § 350-5 (1993) (providing that the "spousal privilege . . . shall not be

grounds for excluding evidence in any judicial proceeding resulting from a report of child abuse or neglect pursuant to this chapter"); IDAHO CODE § 9-203(7) (Michie 1998) (creating an exception to the confidential communications privilege in proceedings for the "case of physical injury to a minor child where the injury has been caused as a result of physical abuse or neglect by one or both of the parents"); 725 ILL. COMP. STAT. 5/115-16 (1998) (allowing a spouse to testify to confidential communications in criminal proceedings "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"); 735 ILL. COMP. STAT. 5/8-801 (1998) (specifying that in civil actions there is no confidential communications privilege "where the custody, support, health, or welfare of their children or children in either spouse's care, custody or control" is in issue); IND. CODE § 31-32-11-1 (1999) (providing the husband-wife privilege "is not a ground for excluding evidence in any judicial proceeding resulting from a report of a child who may be victim of child abuse or neglect"); IOWA CODE ANN. § 232.74 (West 2000) (abrogating the confidential communication privilege in "proceedings resulting from reports of child abuse"); KY. REV. STAT. ANN. § 620.050(2) (Banks-Baldwin 2000) (establishing the husband-wife privilege is not a ground for "excluding evidence regarding a . . . neglected, or abused child" resulting from a report of child abuse); LA. REV. STAT. ANN. § 14:403(B) (West Supp. 2001) (providing that "[i]n any proceeding concerning the abuse or neglect or sexual abuse of a child . . . evidence may not be excluded on any ground of privilege"); ME. REV. STAT. ANN. tit. 22, § 4015 (West 1964) (abrogating the spousal privileges when "giving evidence in a child protection proceeding"); MASS. GEN. LAWS ANN. ch. 233, § 20 (West 2000) (allowing a spouse to testify to confidential communications in proceedings involving abuse of children under the age of eighteen); MICH. COMP. LAWS § 722.631 (West 1993) (abrogating the marital communications privilege in a "civil child protective proceeding" resulting from a report of child abuse); MINN. STAT. ANN. § 595.02(1)(a) (West 2000) (establishing that there is no confidential communications privilege in cases of neglect); Mo. ANN. STAT. § 210.140 (West 1996) (specifying that no privileged communication shall "apply to situations involving known or suspected child abuse or neglect and shall not constitute grounds for failure . . . to give or accept evidence in any judicial proceeding relating to child abuse or neglect"); MONT. CODE ANN. § 46-16-212(1)(c) (1999) (providing that a spouse may testify to confidential communications when "the defendant-spouse has been charged with abuse, abandonment, or neglect of the other spouse or either spouse's children"); NEB. REV. STAT. § 28-707(2) (1995) (establishing the confidential communications privilege does not exclude testimony for prosecutions involving crimes against the family); Nev. Rev. STAT. ANN. § 432B.255 (Michie 2000) (indicating that in proceedings resulting from reports of child abuse the report or contents "shall not be excluded on the ground that the matter would otherwise be privileged against disclosure"); N.H. REV. STAT. ANN. § 169-C:32 (1994) (abrogating the confidential communications privilege in proceedings involving child abuse); N.M. STAT. ANN. § 32A-4-5(A) (Michie 1999) (indicating reports of child abuse or neglect will not be excluded "on the ground that the matter is or may be the subject of a . . . privilege or rule against disclosure"); N.Y. FAM. CT. ACT § 1046(a)(vii) (McKinney Supp. 2001) (stating the confidential communications privilege is not "a ground for excluding evidence which otherwise would be admissible"); N.C. GEN. STAT. § 8-57.1 (1999) (providing that "the husband-wife privilege shall not be ground for excluding evidence regarding the abuse or neglect of a child"); N.D. CENT. CODE § 50-25.1-10 (1999) (abrogating the confidential communications privilege "in any proceeding regarding child abuse, neglect, or death resulting from abuse or neglect resulting from a report made under this chapter"); OHIO REV. CODE ANN. § 2945.42 (1997) (allowing a spouse to testify to confidential

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communications in civil or criminal proceedings for neglect or cruelty to their children); OKLA. STAT. ANN. tit. 10, § 7113 (West 1998) (establishing in proceedings resulting from a report of child abuse the report "shall not be excluded on the ground that the matter is or may be the subject of a . . . privilege or rule against disclosure"); OR. REV. STAT. § 419B.040(1) (1999) (indicating that "filn the case of abuse of a child . . . the husband-wife privilege . . . shall not be a ground for excluding evidence regarding a child's abuse"); 23 PA. CONS. STAT. ANN. § 6381(C) (West Supp. 2000) (specifying the confidential communications privilege "shall not constitute grounds for excluding evidence at any proceeding regarding child abuse or the cause of child abuse"); R.I. GEN. LAWS § 40-11-11 (1997) (abrogating the confidential communications privilege in "situations involving known or suspected child abuse or neglect"); S.C. CODE ANN. § 19-11-30 (Law. Co-op. Supp. 1999) (providing that a spouse is required to disclose confidential communications when the case "is based on child abuse or neglect"); S.D. CODIFIED LAWS § 26-8A-15 (Michie 1999) (indicating the confidential communications privilege "may not be claimed in any judicial proceeding involving an alleged abused or neglected child"); TENN. CODE ANN. § 37-1-411 (1996) (establishing the husband-wife privilege is not sufficient grounds for "excluding evidence regarding harm or the cause of harm to a child in any . . . neglect proceedings resulting from a report of such harm . . . or a criminal prosecution for severe child abuse"); VA. CODE ANN. § 63.1-248.11 (Michie 1995) (making the husband-wife privileges inapplicable in proceedings resulting from reports of child abuse or neglect); WASH. REV. CODE ANN. § 5.60.060 (West 1995) (creating an exception to the confidential communications privilege when a spouse commits a crime against the other spouse or when a spouse commits a crime against a "child of whom said husband or wife is the parent or guardian"); W. VA. CODE ANN. § 49-6A-7 (Michie 1999) (abrogating the confidential communications privilege "in situations involving suspected or known child abuse or neglect"); WYO. STAT. ANN. § 14-3-210(a)(i) (Michie 1999) (implementing a rule that evidence in proceedings resulting from a report of child abuse or neglect "shall not be excluded on the ground that it constitutes a privileged communication" between spouses); see also State v. Waleczek, 585 P.2d 797, 800 (Wash. 1978) (finding the husband-wife privileges were "subordinated to the overriding and paramount legislative intent to protect children from physical and sexual abuse"). A few states have adopted rules or statutes that are less clear whether the confidential communications privilege is abrogated in child abuse proceedings. See CONN. GEN. STAT. ANN. § 54-84a (West 1994) (establishing that if a spouse is charged with cruelty or abuse of a child that the other spouse may be "compelled to testify in the same manner as any other witness"); KAN. STAT. ANN. § 60-428(b)(3) (1994) (establishing exceptions to the confidential 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"); MD. CODE ANN., CTS. & JUD. PROC. § 9-106(a)(1) (1998) (compelling a spouse to testify as an adverse witness if the charge involves abuse of a child under eighteen); MISS. R. EVID. 504(d) (indicating there is no husband-wife privilege when a spouse is charged with "a crime against (1) the person of any minor child or (2) the person or property of (i) the other spouse, (ii) a person residing in the household of either spouse"); TEX. R. EVID. 504(a)(4)(C)-(b)(4)(A) (establishing there is no confidential communications privilege or adverse testimonial 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"); UTAH R. EVID. 502(b)(4)(C) (indicating there is no confidential communications privilege in any proceeding where a "spouse is charged with a crime or tort against the person or property of (i) the other, (ii) a child of either, (iii) a person residing in the household of either"); VT. R. EVID. 504 (providing that there is no

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Furthermore, one of the goals of codifying the MRE was that all future military evidentiary rules would follow the Federal Rules of Evidence, unless there was a valid military reason for departure from the Federal Rules of Evidence.²⁶⁵ The interpretation of Federal Rule of Evidence 501 has led to broader exceptions for the marital privileges.²⁶⁶ There does not appear to be a valid military reason for departing from this trend of protecting children from physical or sexual abuse. Indeed, based on the Family Care Plan requirement, there seems to be a valid military reason for such an exception.

confidential communications privilege when a spouse is charged with a crime "against the person or property of (1) the other, (2) a child of either, (3) a person residing in the household of either"); Wis. STAT. ANN. § 905.05(3)(b) (West 2000) (indicating there is no confidential communications privilege when a spouse is charged "with a crime against the person or property of the other or of a child of either"). It appears that only New Jersey has clearly decided not to eliminate the confidential communications privilege in cases of child abuse or neglect. N.J. STAT. ANN. § 9:6-8.21 (West Supp. 2000), Senate Institutions, Health and Welfare Committee Statement (indicating in cases of child abuse or neglect the legislature reinstated "the privilege of confidentiality in communications between husband and wife"). Furthermore, some states have not limited the abrogation of this privilege to a child of either spouse. See, e.g., State v. Salzman, 679 P.2d 544, 546 (Ariz. Ct. App. 1984) (applying this exception to include communications about child abuse when the victim was not a child of either spouse); Villalta v. Commonwealth, 702 N.E.2d 1148, 1152 (Mass. 1998) (finding that the phrase "proceeding related to child abuse" was not limited to a child of either spouse but included the abuse of any child). The issue of how such a rule interacts with the statutes or evidentiary rules about the marital privileges is beyond the scope of this article because it is for the judiciary to determine which statute or rule applies. See People v. Corbett, 656 P.2d 687, 689 (Colo. 1983) (finding because of the existence of the Child Protection Act the marital privilege could not be used to prevent the wife from testifying in a case where her husband was alleged to have sexually assaulted the wife's eleven-year-old sister); State v. Johnson, 318 N.W.2d 417, 439 (Iowa 1982) (finding when judicial proceedings result from a report of child abuse, Section 232.74 prevented application of any marital privileges); Mullins v. Commonwealth, 956 S.W.2d 210, 212 (Ky. 1997) (finding the statute making the spousal privilege inapplicable in child abuse cases did not interfere with Rule 504 but enhanced the rule by refusing to allow the husband-wife privilege to act as a shield). But see State v. Martinez, 872 P.2d 708, 713 (Idaho 1994) (stating that to the extent that statutory provisions conflict with Idaho Rules of Evidence, the statutory provision has no force or effect); Commonwealth v. Spetzer, 722 A.2d 702, 707-08 (Pa. Super. Ct. 1998) (finding that the Child Protective Services Law stating, "a privilege of confidential communication between husband and wife or between any professional person . . . shall not constitute grounds for excluding evidence at any proceeding regarding child abuse or the cause of child abuse," did not abrogate the confidential communications privilege in criminal proceedings).

²⁶⁵ See supra note 34.

²⁶⁶ See supra discussion Part II.C.1.

IV. PROPOSAL FOR AN AMENDED MRE 504(C)(2)(A)

Such policy considerations and the unique nature of military life should guide the determination of whether to extend the exceptions to the marital privileges under MRE 504(c)(2)(A). As currently written, MRE 504(c)(2)(A) is not only potentially incapable of protecting certain groups of children, but it is also vague as to the meaning of who is "a child of either spouse." This Part proposes an amended version of MRE 504(c)(2)(A) and explains how the amended rule would have applied in Michelle's situation. 268

A. The Proposed Amendment to MRE 504(c)(2)(A)

MRE 504(c)(2)(A) is similar to those rules fitting into the second category of state approaches: those recognizing the only exception to the marital privileges is for offenses committed against the spouse or "a child of either spouse." This Part proposes to solve the problems of the meaning of "a child of either spouse" and to simplify the analysis of whether the marital privileges apply. The only change being proposed to MRE 504 is to allow a spouse who is acting as a guardian or in loco parentis over a child to testify to confidential communications, thus adversely to the spouse, when a spouse is accused of a crime against a child over whom a spouse is the guardian or in loco parentis. The following text is the language of MRE 504 with the proposed change in italics:

Military Rule of Evidence 504. Husband-Wife Privilege.

- (a) Spousal incapacity. A person has a privilege to refuse to testify against his or her spouse.
- (b) Confidential communication made during marriage.
 - (1) General rule of privilege. A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from

²⁶⁷ See supra Part III.B.

²⁶⁸ See commentary infra Part IV.A.

²⁶⁹ See discussion supra Part III.A.2.

²⁷⁰ Although not following the identical language of the Washington statute posed by the military judges as an appropriate model, this statute would cover the same groups of children. See supra notes 166, 223, 231-34 and accompanying text.

disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

- (2) Definition. A communication is "confidential" if made privately by any person to the spouse of the person and is not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication.
- (3) Who may claim the privilege. The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is presumed in the absence of evidence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused regardless of whether the spouse who made the communication objects to its disclosure.

(c) Exceptions

- (2) Spousal incapacity and confidential communications. There is no privilege under subdivisions (a) or (b):
 - (A) In proceedings in which one spouse is charged with a crime against the person or property of: the other spouse, a child of either, a child under the custody or control of either spouse in a guardianship or in loco parentis relationship, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse; or²⁷¹

²⁷¹ The remainder of the rule states:

⁽B) When the marital relationship was entered into with no intention of the parties to live together as spouses, but only for the purpose of using the purported marital relationship as a sham, and with respect to the privilege in subdivision (a), the relationship remains a sham at the time the testimony or statement of one of the

Commentary

This amendment is designed to help protect children and to reduce the number of military personnel who are abusing children that are not "a child of either spouse" but, nonetheless, are under the custody or control of one of the spouses.²⁷² The motivation for this proposed amendment is the fact that each year over three million children are abused, with a child being sexually assaulted every two minutes.²⁷³ Furthermore, these crimes usually occur in private by someone whom the victim loves and trusts, so there are no witnesses.²⁷⁴ A corollary to construing privileges narrowly is to construe exceptions to privileges broadly.²⁷⁵ Therefore, in case of any ambiguity this rule should be construed broadly in an attempt to provide children, not the abusive spouse, the greatest amount of protection possible.

This amendment is designed to eliminate the ambiguity in MRE 504(c)(2)(A). The amended rule will protect biological children, foster children, adopted children, and children over whom a spouse is a guardian or stands in loco parentis. Therefore, it will no longer be

parties is to be introduced against the other; or with respect to the privilege in subdivision (b), the relationship was a sham at the time of communication; or

(C) In proceedings in which a spouse is charged, in accordance with Article 133 or 134, with importing the other spouse as an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328; with transporting the other spouse in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421-2424; or with violation of such other similar statutes under which such privilege may not be claimed in the trial of criminal cases in the United States district courts.

MIL. R. EVID. 504.

²⁷² See supra note 4.

²⁷³ See supra note 2.

²⁷⁴ See supra note 2.

²⁷³ See State v. Eveans, 660 N.E.2d 240, 246-47 (Ill. App. Ct. 1996) (stating that a corollary to construing privileges narrowly is to construe the child interest exception broadly "to afford the greatest protection to children rather than to the abusive or murderous spouse" and construing this exception to apply when "either spouse has the care, custody, or control of any child not only at the time of trial, but also at the time of the offense"). Furthermore, the Supreme Court has recently adopted a more permissive view to the creation of new privileges. Ricafort, supra note 48, at 259. For example, the Supreme Court in Jaffee v. Redinoid, recognized a federal psychotherapist-patient privilege because the protection of confidential communications between a psychotherapist and his or his patient "promotes sufficiently important interests to outweigh the need for probative evidence." 518 U.S. 1, 9-10 (1996) (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).

relevant whether the victim is "a child of either spouse." Furthermore, such an amendment will not require that for the exception to apply the offense be committed against a spouse or "a child of either spouse" because it solves the current rule's inability to protect non-biological children from abuse.

The phrase "child under the custody or control of either spouse in a guardian or in loco parentis relationship" is meant to include situations even if there is no paper documentation to such effect. Not only should this determination be based upon the facts and circumstances of each case,²⁷⁶ but the amendment's purpose of protecting children should also be a significant consideration in any case. For purposes of this amendment, a spouse is not required to go to court to become the child's guardian. Such a requirement would defeat the purpose of this amendment, which is to protect all children residing in the home, regardless of their legal relationship to either spouse.

In this amendment, the term guardian is not used in the legal sense. The legal definition of guardian is "[o]ne who has the legal authority and duty to care for another's person or property, [especially] because of the other's infancy, incapacity, or disability."²⁷⁷ Rather, the term guardian is meant to include a quasi-guardian, or guardian by estoppel, which is defined as "a guardian who assumes that role without any authority."²⁷⁸ The reason for such an interpretation is that the military does not require a person to go to court and obtain such legal authority over a child to recognize that person as the temporary guardian of that child.²⁷⁹ The definition of guardian as used in this amendment is also meant to include those spouses acting in loco parentis or "acting as a temporary guardian of a child."²⁸⁰ This amendment is not designed to include those children that are only occasional or overnight guests in a household. Therefore, not every child who is abused will be covered by this exception to the marital privileges.

Although the protection of children is the focus of this amendment, the exception is meant to protect only those children who have for some

²⁷⁶ See supra note 233 and accompanying text.

²⁷⁷ BLACK'S LAW DICTIONARY, supra note 8, at 712.

²⁷⁸ Id. at 713.

²⁷⁹ See supra notes 247-48 and accompanying text.

²⁸⁰ BLACK'S LAW DICTIONARY, supra note 8, at 791; see also supra note 232 and accompanying text.

reason become part of the family unit. To allow all children to be covered by such an exception would completely erode the marital privileges and would do so without sufficient justification. The reason for such a limitation to the marital privileges is that when a spouse commits an offense against a child who has become a part of the family unit, such a crime becomes comparable to an offense against the spouse. The reason for this is because the spouse is responsible for the protection of that child, and that protection is violated when an offense is committed against that child. The amendment is, therefore, designed to protect a larger category of abused children by eliminating the need for determining whether the victim is a de facto child and that the crime also constituted an offense against the spouse.

B. Applying the Amendment to Michelle²⁸¹

In determining whether Michelle would have been protected by this amendment, the first step is to determine whether Michelle was under her sister's control or custody. This requires looking to the unique facts and circumstances of the case. Michelle was visiting her sister for the summer and while Michelle was there, Kathy can best be described as acting as a mother for Michelle. Kathy took care of all of Michelle's basic needs and necessities because Michelle was unable to take care of herself. Considering the facts and circumstances of this case, Kathy can best be described as having an *in loco parentis* relationship with Michelle. As such, Kathy would be allowed to testify about the confidential communications between herself and her husband, thus increasing the likelihood of obtaining a conviction of rape.

V. CONCLUSION

The Military Justice System, though substantially similar to the civilian criminal justice system, does not allow a spouse to testify to confidential communications unless the communication is about an offense committed against the spouse or "a child of either spouse." This limited exception does not meet the purpose of such an exception: the protection of children from abuse in the home. The current trend in the area of privileges is to broadly expand the exceptions to the marital privileges. An exception to the marital privileges covering minor

²⁸¹ See discussion supra Part I.

²⁸² See supra note 233 and accompanying text.

children over whom a spouse is guardian or *in loco parentis* would meet this goal and would help servicemembers effectively perform their military duties while deployed because they would have an increased belief in the security of their children.

Kimberly Ann Connor