

Winter 2006

Twenty-First Century Pillow-Talk: Applicability of the Marital Communications Privilege to Electronic Mail

Mikah K. Story

University of Missouri-Kansas City

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

Mikah K. Story, Twenty-First Century Pillow-Talk: Applicability of the Marital Communications Privilege to Electronic Mail, 58 S. C. L. Rev. 275 (2006).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

Story: Twenty-First Century Pillow-Talk: Applicability of the Marital Co
**TWENTY-FIRST CENTURY PILLOW-TALK:
 APPLICABILITY OF THE MARITAL COMMUNICATIONS
 PRIVILEGE TO ELECTRONIC MAIL**

MIKAH K. STORY*

I. INTRODUCTION	276
II. THE HISTORY OF THE MARITAL COMMUNICATIONS PRIVILEGE	277
III. WEB-BASED ELECTRONIC MAIL	283
A. <i>Privacy Agreements</i>	283
B. <i>Fourth Amendment Protection</i>	284
C. <i>The Stored Communications Act</i>	286
IV. ANALYSIS OF THE MARITAL COMMUNICATIONS PRIVILEGE AS APPLIED TO WEB-BASED E-MAIL	288
A. <i>Applicability of the Marital Communications Privilege to Letters</i> ..	288
B. <i>Applicability of the Marital Communications Privilege to Oral Communications</i>	291
C. <i>The Effect of E-mail on Applicability of the Professional Privileges</i>	293
1. <i>E-mail and the Attorney-Client Privilege</i>	294
2. <i>A Comparison of the Marital Communications Privilege to the Other Evidentiary Privileges</i>	297
3. <i>Legislative Solutions</i>	303
V. THE FUTURE OF THE MARITAL COMMUNICATIONS PRIVILEGE	304
A. <i>The Utilitarian Approach</i>	305
B. <i>The Humanistic Approach</i>	308
1. <i>The Informational Privacy Rationale</i>	309
2. <i>The Individual Autonomy Rationale</i>	310
VI. CONCLUSION	316

* Associate Professor of Law, the University of Missouri-Kansas City. I am deeply grateful to the entire faculty at the University of Missouri-Kansas City School of Law, with special thanks to Dean Ellen Suni, Nancy Levit, Robert Klonoff, Barbara Glesner Fines, David Achtenberg, and Jasmine Abdel-khalik. I would also like to thank Kelly McCambridge-Parker for her exceptional research assistance and my administrative assistant, Debra Banister, for her hard work..

I. INTRODUCTION

Consider the following hypothetical (Hypothetical One): Harold Smith has just committed a homicide. Harold's boss discovered that Harold had been embezzling the company's money for the past two years. When Harold's boss confronted him, Harold became violent and shot his boss with the handgun Harold kept in his desk drawer. Harold is now on the run. He purchased an airline ticket to Mexico City, Mexico. Once he arrived in Mexico City, he wrote a letter to his wife explaining what had happened. Harold mailed the letter to his wife with no return address. Wendy, Harold's wife, received the letter three days after learning that Harold was wanted for murder. When police officers arrived at Wendy's home to question her, she admitted that she had received a letter from her husband. However, Wendy refused to disclose the contents of the letter because her attorney advised her that the marital communications privilege would protect any communications between Harold and Wendy. Despite the police officers' best efforts, they were unable to learn the contents of the letter.

Now, consider the following hypothetical (Hypothetical Two): The facts are identical to those of Hypothetical One with one significant change. Rather than writing Wendy a letter, Harold visited an internet café in Mexico City and sent Wendy an e-mail from his Hotmail account to her Hotmail account. During the police officers' questioning of Wendy, she admitted that she received an e-mail from Harold, but she refused to disclose the contents of the e-mail. Not to be deterred, the police officers contacted the assistant district attorney on the case and explained the situation. The assistant district attorney prepared a subpoena directed to Microsoft, the operator of Hotmail.¹ The subpoena demanded production of any e-mails sent between Harold's account and Wendy's account during the week following the homicide. Microsoft complied with the subpoena and produced the e-mails, which are stored on a server owned by Microsoft.

Most would agree that the marital communications privilege protects the communication between Harold and Wendy described in Hypothetical One. However, the change in the form of communication described in Hypothetical Two could affect application of the privilege. This Article takes a fresh and innovative look at whether the marital communication privilege should protect communications between husband and wife sent via electronic means.

Traditionally, the marital communications privilege is destroyed when a third party, without the knowledge or involvement of the recipient-spouse,² intentionally or inadvertently discovers the communication.³ In the context of electronic communication,⁴ where Internet Service Providers (ISPs) have access to otherwise

1. See Microsoft Online Services Home, <http://join.msn.com> (last visited Nov. 14, 2006).

2. For purposes of this Article, "recipient-spouse" refers to the spouse who receives the communication from the "communicating spouse."

3. See *infra* notes 27–28 and accompanying text.

4. "Electronic communication" is limited, for purposes of this article, to electronic mail. Other forms of electronic communication, including text messages, instant messages, and cellular phone conversations, are outside the purview of this article.

confidential communications, the marital communications privilege may not apply at all.⁵ Indeed, it is possible to argue that the marital communications privilege is inherently at odds with this form of communication.

This Article has two purposes. First, it explores whether the marital communications privilege currently protects e-mail communication and whether the privilege *should* protect such communication. Second, it addresses whether the marital communications privilege should continue to exist, considering the traditional purposes of the privilege. Part II of the Article discusses the history of the marital communications privilege. Part III explores the details of e-mail storage and addresses constitutional and statutory provisions outside the context of the marital communications privilege that provide some privacy protection for electronic communications. Part IV takes a critical look at whether the marital communications privilege applies to electronic communication based on more traditional applications of the privilege and highlights three legislative solutions that have been put in place to protect privileged communications made electronically. Part V discusses whether courts should reconsider the marital communications privilege as a whole considering the stated purposes of the privilege. Part VI provides a conclusion.

II. THE HISTORY OF THE MARITAL COMMUNICATIONS PRIVILEGE

The marital privilege has two parts: the testimonial privilege and the communications privilege. Originally, the testimonial privilege prevented one spouse from testifying against another. According to the United States Supreme Court, spousal disqualification sprang from two canons of medieval jurisprudence:

First, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; second, the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one.⁶

Thus, if a husband were not permitted to testify, then his wife, as a part of the husband, likewise should not be permitted to testify.⁷

5. See *infra* Part III.

6. Trammel v. United States, 445 U.S. 40, 44 (1980); see also John T. Hundley, "Inadvertent Waiver" of Evidentiary Privileges: Can Reformulating the Issue Lead to More Sensible Decisions?, 19 S. ILL. U. L.J. 263, 265 n.9 (comparing the application of the original testimonial privilege to cases holding the testimony of slaves inadmissible against their masters).

7. Trammel, 445 U.S. at 44; see also People v. Hamacher, 438 N.W.2d 43, 55 (Mich. 1989) (Boyle, J., dissenting) ("The marital privileges can be traced to the period of our history when a woman, possessing no legal identity of her own, was treated as the chattel of her husband.").

In 1933, the United States Supreme Court abolished the rule disqualifying spouses from testifying in federal court on each other's behalf;⁸ however, a privilege remained that prevented either spouse from providing adverse testimony against the other.⁹ The rationale for the testimonial privilege is its role in protecting marital harmony and the sanctity of the marital relationship.¹⁰ In *Hawkins v. United States*, the Court held that the testimonial privilege prevented one spouse from testifying adversely against the other regardless of whether the testimony was voluntary or compelled by the government.¹¹ Over twenty years later in *Trammel v. United States*, the Court held that the testimonial privilege, as applied in the federal courts, should vest in the witness-spouse alone, thereby allowing the witness-spouse to voluntarily provide adverse testimony against the defendant-spouse.¹²

The Supreme Court expressly recognized the communications privilege in 1934.¹³ In *Wolfe v. United States*, the Court noted that the purpose of the privilege is to protect "marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails."¹⁴ The purpose of the marital communications privilege is very similar to the purposes of the other evidentiary privileges recognized by the courts, including the privileges between attorney and client, physician and patient, psychotherapist and patient, and clergy and communicant,

8. *Funk v. United States*, 290 U.S. 371, 386–87 (1933). In *Funk*, the Court noted a major change in the common law in that defendants are no longer disqualified from testifying on their own behalf. *Id.* at 381. Thus, "a refusal to permit the wife upon the ground of interest to testify in behalf of her husband, while permitting him, who has the greater interest, to testify for himself, presents a manifest incongruity." *Id.* According to the Court in *Funk*, any risk of bias or interest on the part of the witness-spouse could be reduced through the use of cross-examination, thus making the issue of bias an issue of credibility rather than competency to testify. *Id.* at 380.

9. *Id.* at 373; see also *Hawkins v. United States*, 358 U.S. 74, 76 (1958) (citing *Funk*, 290 U.S. at 373; *Griffin v. United States*, 336 U.S. 704, 714–15 (1949)) ("The *Funk* case . . . did not criticize the phase of the common-law rule which allowed either spouse to exclude adverse testimony by the other, but left this question open to further scrutiny.").

10. *Trammel*, 445 U.S. at 44. As the Court noted in *Hawkins*, "[t]he basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well." 358 U.S. at 77.

11. 358 U.S. at 77–79. The *Hawkins* Court found that "the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences." *Id.* at 79.

12. 445 U.S. at 53. The Court reasoned that when one spouse is willing to provide adverse testimony against the other spouse, "their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve." *Id.* at 52.

13. See *Wolfe v. United States*, 291 U.S. 7, 14 (1934).

14. *Id.*; see also Anne N. DePrez, Note, *Pillow Talk, Grimgribbers and Connubial Bliss: The Marital Communication Privilege*, 56 IND. L.J. 121, 127 (1980) (stating that a second rationale for the communications privilege "is that society finds it naturally repugnant to observe a wife being forced to reveal her husband's marital confidences on the witness stand").

in that each of these privileges is “rooted in the imperative need for confidence and trust.”¹⁵

Thus, communications between spouses are presumptively confidential, and any party seeking to introduce such communications into evidence must overcome the presumption by establishing facts which show a lack of confidentiality.¹⁶ One way to overcome the presumption is to show that the communication was made in the presence of a third party.¹⁷ In *Wolfe*, the government sought to introduce into evidence a letter written by the petitioner to his wife.¹⁸ Although the privilege would normally protect this type of communication, the government argued that the petitioner’s utilization of his personal stenographer to write the letter prevented the marital communications privilege from attaching.¹⁹ The government sought to introduce the contents of the letter not through the testimony of the wife, but through that of the stenographer, who had kept her notes.²⁰ The government argued that communications between spouses are not privileged if proof of the content of the communications can be made by a witness who is neither the husband nor the wife.²¹ The Court agreed, holding that the privilege did not prevent disclosure of the contents of the letter.²² According to the Court, disclosure to the stenographer was voluntary and unnecessary.²³ Thus, the petitioner’s decision to reveal the communication to a third party destroyed any privilege that would have otherwise attached to the communication.²⁴

This rule (the third party presence rule) is in accord with the courts’ desire to construe the privilege narrowly due to the privilege’s role in “obstruct[ing] the

15. *Trammel*, 445 U.S. at 51.

The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.

Id.

16. *Pereira v. United States*, 347 U.S. 1, 6 (1954) (“Although marital communications are presumed to be confidential, that presumption may be overcome by proof of facts showing that they were not intended to be private.”); *see also* *Blau v. United States*, 340 U.S. 332, 333 (1951) (stating that courts presume that marital communications are privileged); *Wolfe*, 291 U.S. at 14 (assuming that marital communications are meant to be confidential and are therefore privileged).

17. *Wolfe*, 291 U.S. at 14.

18. *Id.* at 12.

19. *Id.* at 12–13.

20. *Id.* at 12.

21. *Id.* at 13.

22. *Id.* at 17.

23. *Id.* at 16–17.

24. *Id.* at 17. In support of its holding, the Court cited cases finding that communications between spouses voluntarily made in the presence of their children or other family members are not privileged. *Id.* (citing *Linnell v. Linnell*, 143 N.E. 813, 814 (Mass. 1924); *Cowser v. State*, 157 S.W. 758, 760 (Tex. Crim. App. 1913); *Fuller v. Fuller*, 130 S.E. 270, 271 (W.Va. 1925)).

truth-seeking process.”²⁵ Additionally, while the purpose of the communications privilege is the preservation of marital confidences, courts reason that this purpose is not thwarted if a third party brings the communication into evidence.²⁶ Importantly, there is only one circumstance where the privilege will attach despite disclosure to a third party outside the marriage. Attachment of the privilege will occur when the recipient-spouse *voluntarily* discloses the communication to a third party.²⁷ Where the recipient-spouse colludes with a third party to betray the trust of the communicating spouse, courts seek to protect the trust upon which the communicating spouse relied when confiding in the recipient-spouse.²⁸

Many commentators have criticized the communications privilege,²⁹ with some authors arguing that courts should abandon the privilege entirely.³⁰ Opponents of the privilege argue that it blocks the truth-seeking process while failing to adequately promote marital harmony.³¹ Others have argued that the communications privilege “perpetuate[s] the role of male domination in the marriage” because a husband usually invokes the privilege to prevent his wife’s disclosure of confidential communications, thereby benefiting men more often than women.³² Finally, opponents of the privilege have argued that the privilege is unnecessary considering the fact that most married couples are unaware of its existence.³³ The Judicial Conference Advisory Committee on the Rules of Evidence apparently agreed with this criticism of the communications privilege. The Committee drafted proposed Federal Rule of Evidence 505, which addressed the testimonial privilege but failed to mention the communications privilege.³⁴ In the

25. *United States v. Marashi*, 913 F.2d 724, 730 (9th Cir. 1990).

26. *See State v. Myers*, 640 P.2d 1245, 1248–49 (Kan. 1982) (finding the third party presence rule assists in the discovery of the truth while protecting confidential communications between husband and wife).

27. *See* 8 WIGMORE, EVIDENCE § 2339(2) (McNaughton rev. 1961).

28. *See Yokie v. State*, 773 So. 2d 115, 117 (Fla. Dist. Ct. App. 2000). In *Yokie*, the defendant’s wife allowed police officers to come into her home and listen in on her telephone conversations with her husband. *Id.* at 116. The court held that the communications privilege would attach to the phone conversations even though a third party was present because the defendant’s wife had, “with the state’s encouragement, betrayed the trust that the privilege is designed to protect by deliberately misleading [the defendant] into feeling safe in making the otherwise privileged disclosures.” *Id.* at 117.

29. *See, e.g., MCCORMICK ON EVIDENCE* § 86 (John W. Strong ed., 5th ed. 1999) (noting that some commentators have criticized both marital privileges, especially in the absence of empirical support).

30. *See generally* DePrez, *supra* note 14, at 137–38 (noting that operation of the marital communications privilege often excludes vital evidence). DePrez further argues that the marital communications privilege, in its current form, should be abandoned and replaced with a privilege that protects confidential communications between spouses only to the extent such communications are protected by the constitutional right to privacy. *Id.* at 149.

31. *See MCCORMICK ON EVIDENCE*, *supra* note 29, § 86 (“[W]hile the danger of injustice from suppression of relevant proof is clear and certain, the probable benefits of the rule of privilege in encouraging marital confidences and wedded harmony is at best doubtful and marginal.”).

32. *People v. Hamacher*, 438 N.W.2d 43, 56 n.5 (Mich. 1989) (Boyle, J., dissenting).

33. DePrez, *supra* note 14, at 136.

34. *See Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 244 (1972) (Proposed Rule 505).

Advisory Committee's Notes following the proposed Rule, the Committee stated that Rule 505 did not recognize the communications privilege because a privilege "of whose existence the parties in all likelihood are unaware" may have little influence on marital conduct.³⁵ The Committee reasoned that, unlike the other evidentiary privileges, there is no professional party in the marital relationship who can advise the communicating party of the existence of the privilege.³⁶ Congress rejected proposed Rule 505, along with eight other proposed rules that would have codified various evidentiary privileges,³⁷ and enacted Rule 501,³⁸ which was intended to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis."³⁹

Despite criticism of the rule, the marital communications privilege is quite prevalent. The privilege is codified in forty-nine states and the District of Columbia.⁴⁰ At the federal level, although the marital communications privilege is not codified in the Federal Rules of Evidence, the privilege is a part of federal

35. *Id.* at 246.

36. *Id.*

37. *See id.* at 234–35 (proposing Rule 502 for the required reports privilege); *id.* at 235–37 (proposing Rule 503 for the attorney-client privilege); *id.* at 240–41 (proposing Rule 504 for the psychotherapist-patient privilege); *id.* at 244–45 (proposing Rule 505 for the spousal testimonial privilege); *id.* at 247 (proposing Rule 506 for the clergy-communicant privilege); *id.* at 249 (proposing Rule 507 for the political vote privilege); *id.* at 249–50 (proposing Rule 508 for the trade secrets privilege); *id.* at 251–52 (proposing Rule 509 for the secrets of state privilege); *id.* at 255–56 (proposing Rule 510 for the identity of informant privilege).

38. Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926, 1933–34 (1975).

39. 120 CONG. REC. 40,890, at 40,891 (1974) (statement of Rep. Hungate).

40. *See* ALA. R. EVID. 504(b); ALASKA R. EVID. 505(b); ARIZ. REV. STAT. ANN. § 12-2232 (2003); ARK. R. EVID. 504(b); CAL. EVID. CODE § 917(a) (West Supp. 2006); COLO. REV. STAT. § 13-90-107(1)(a)(I) (Supp. 2006); DEL. UNIF. R. EVID. 504(b); D.C. CODE ANN. § 14-306 (LexisNexis Supp. 2006); FLA. STAT. ANN. § 90.504 (West 1999); GA. CODE ANN. § 24-9-21(1) (1995); HAW. R. EVID. 505(b); IDAHO CODE ANN. § 9-203(1) (2004); 735 ILL. COMP. STAT. ANN. 5/8-801 (West 2003); IND. CODE ANN. § 34-46-3-1(4) (LexisNexis 1998); IOWA CODE ANN. § 622.9 (West 1999); KAN. STAT. ANN. § 60-428 (2005); KY. R. EVID. 504(b); LA. CODE EVID. ANN. art. 504 (2006); ME. REV. STAT. ANN. tit. 15 § 1315 (1999); MD. CODE ANN. CTS. & JUD. PROC. § 9-105 (LexisNexis 2002); MASS. GEN. LAWS ANN. ch. 233 § 20 (2006); MICH. COMP. LAWS ANN. § 600.2162(7) (West Supp. 2006); MINN. STAT. ANN. § 595.02(a) (West 2000); MISS. R. EVID. 504(b); MO. ANN. STAT. § 546.260 (West 2006); MONT. CODE ANN. § 26-1-802 (2005); NEB. REV. STAT. § 27-505 (1995); NEV. REV. STAT. ANN. § 49.295(1)(b) (LexisNexis 2002); N.H.R. EVID. 504; N.J. STAT. ANN. § 2A:84A-22 (West 1994); N.M. Stat. Ann. § 38-6-6(A) (LexisNexis 2004); N.Y. C.P.L.R. 4502(b) (McKinney 1992); N.C. GEN. STAT. § 8-57(c) (2005); N.D.R. EVID. 504(b); OHIO REV. CODE ANN. § 2945.42 (LexisNexis 2006); OKLA. STAT. ANN. tit. 12, § 2504 (West Supp. 2006); OR. REV. STAT. § 40.255 (2005); 42 PA. CONS. STAT. ANN. § 5914 (West 2000); R.I. GEN. LAWS § 9-17-13 (1997); S.C. CODE ANN. § 19-11-30 (Supp. 2004); S.D. CODIFIED LAWS § 19-13-13 (1995); TENN. CODE ANN. § 24-1-201 (2000); TEX. R. EVID. 504(a)(2); UTAH CODE ANN. § 78-24-8(1) (2002); VT. R. EVID. 504(b); VA. CODE ANN. § 19.2-271.2 (Supp. 2006); WASH. REV. CODE ANN. § 5.60.060(1) (West Supp. 2006); W. VA. CODE ANN. § 57-3-4 (LexisNexis 2005); WIS. STAT. ANN. § 905.05 (West 2000); WYO. STAT. ANN. § 1-12-104 (2005). Connecticut has not codified the marital communications privilege; however, its courts recognize the privilege and have found that it is a "fixture of [Connecticut] common law." *State v. Christian*, 841 A.2d 1158, 1173 (Conn. 2004).

common law.⁴¹ Additionally, courts in forty-seven states and the District of Columbia have held that the presence of a third party destroys any privilege that might attach to a communication between spouses.⁴²

41. See FED. R. EVID. 501 (stating that the law on evidentiary privileges “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience”); see, e.g., *SEC v. Lavin*, 111 F.3d 921, 925 (D.C. Cir. 1997) (“The federal common law recognizes two types of marital privileges: the privilege against adverse spousal testimony and the confidential marital communications privilege.”); *United States v. Hook*, 781 F.2d 1166, 1173 n.11 (6th Cir. 1986) (noting that the federal common law recognizes a privilege for confidential communications between spouses).

42. See *State v. Summerlin*, 675 P.2d 686, 694–95 (Ariz. 1984) (quoting *State v. Narten*, 407 P.2d 81, 87 (Ariz. 1965)); *Metcalf v. State*, 681 S.W.2d 344, 346 (Ark. 1984) (citing *Sumlin v. State*, 617 S.W.2d 372, 376 (Ark. 1981)); *People v. Gaines*, 375 P.2d 296, 300 (Cal. 1962); *Thrap v. People*, 558 P.2d 576, 578 (Colo. 1977); *Christian*, 841 A.2d at 1178; *Weedon v. State*, 647 A.2d 1078, 1081 (Del. 1994); *Beard v. United States*, 535 A.2d 1373, 1381 (D.C. 1988) (citing *Morgan v. United States*, 363 A.2d 999, 1004 (D.C. 1976); *People v. Torres*, 310 N.E.2d 780, 784–85 (Ill. App. Ct. 1974)); *Proffitt v. State*, 315 So. 2d 461, 465 (Fla. 1975), *aff’d*, 428 U.S. 242 (1976); *Williams v. State*, 77 S.E. 818, 818 (Ga. 1913) (citing *Knight v. State*, 39 S.E. 928, 929 (1901)); *State v. Levi*, 686 P.2d 9, 11 (Haw. 1984); *State v. Moore*, 965 P.2d 174, 182 (Idaho 1998); *People v. Sanders*, 457 N.E.2d 1241, 1243 (Ill. 1983); *Holt v. State*, 481 N.E.2d 1324, 1326 (Ind. 1985); *State v. Countryman*, 572 N.W.2d 553, 561 (Iowa 1997) (citations omitted); *State v. Myers*, 640 P.2d 1245, 1249 (Kan. 1982); *Ewing v. May*, 705 S.W.2d 910, 912 (Ky. 1986); *State v. Stroud*, 5 So. 2d 125, 127–28 (La. 1941); *State v. Benner*, 284 A.2d 91, 109 (Me. 1971); *Master v. Master*, 166 A.2d 251, 255 (Md. 1960); *Martin v. Martin*, 166 N.E. 820, 820 (Mass. 1929) (citing *Commonwealth v. Wakelin*, 120 N.E. 209, 212 (Mass. 1918)); *People v. Rosa*, 256 N.W. 483, 485 (Mich. 1934); *State v. Schifsky*, 69 N.W.2d 89, 94 (Minn. 1955); *Stevens v. State*, 806 So. 2d 1031, 1049 (Miss. 2001) (citations omitted); *State v. Shafer*, 609 S.W.2d 153, 155 (Mo. 1980) (citing *Allen v. Allen*, 60 S.W.2d 709, 711 (Mo. Ct. App. 1933)); *State v. Nettleton*, 760 P.2d 733, 737 (Mont. 1988) (citing *In re Marriage of Sarsfield*, 671 P.2d 595, 601 (Mont. 1983)); *State v. Cowling*, No. A-92-744, 1993 WL 183609, at *3 (Neb. Ct. App. June 1, 1993); *Foss v. State*, 547 P.2d 688, 691 (Nev. 1976); *State v. Wilkinson*, 612 A.2d 926, 931 (N.H. 1992); *State v. Szemple*, 640 A.2d 817, 822 (N.J. 1994); *In re Vanderbilt* (Rosner-Hickey), 439 N.E.2d 378, 382–83 (N.Y. 1982); *State v. Freeman*, 276 S.E.2d 450, 455 (N.C. 1981); *State v. McMorrow*, 314 N.W.2d 287, 292 (N.D. 1982); *State v. Rahman*, 492 N.E.2d 401, 405 (Ohio 1986); *Coles v. Harsch*, 276 P. 248, 252 (Or. 1929); *Commonwealth v. May*, 656 A.2d 1335, 1342 (Pa. 1995) (citing *Commonwealth v. Clark*, 500 A.2d 440, 442 (Pa. Super. Ct. 1985)); *State v. McKercher*, 332 N.W.2d 286, 288 (S.D. 1983); *Hazlett v. Bryant*, 241 S.W.2d 121, 123 (Tenn. 1951) (citations omitted); *State v. Musser*, 175 P.2d 724, 737 (Utah 1946), *vacated on other grounds*, 333 U.S. 95, 98 (1948); *In re Buckman’s Will*, 24 A. 252, 252 (Vt. 1892); *Menefee v. Commonwealth*, 55 S.E.2d 9, 13 (Va. 1949) (quoting *Pilcher v. Pilcher*, 84 S.E. 667, 671 (Va. 1915)); *State v. Thorne*, 260 P.2d 331, 337 (Wash. 1953); *State v. Bohon*, 565 S.E.2d 399, 404–05 (W. Va. 2002); *Kain v. State*, 179 N.W.2d 777, 780–81 (Wis. 1970); *Curran v. Pasek*, 886 P.2d 272, 275 (Wyo. 1994) (citing *Chamberlain v. State*, 348 P.2d 280, 286 (Wyo. 1960)); *Arnold v. State*, 353 So. 2d 524, 527 (Ala. Crim. App. 1977); *State v. Teel*, 712 P.2d 792, 794 (N.M. Ct. App. 1985) (citing *Pereira v. United States*, 347 U.S. 1, 6 (1953)); *McHam v. State*, 126 P.3d 662, 670–71 (Okla. Crim. App. 2005) (citing *Coleman v. State*, 668 P.2d 1126, 1134 (Okla. Crim. App. 1983)); *Zimmerman v. State*, 750 S.W.2d 194, 199 (Tex. Crim. App. 1988) (citations omitted). Alaska and South Carolina courts have not addressed the third party presence rule. *But see Campbell v. Chace* 12 R.I. 333, 334 (R.I. 1879) (excluding from evidence testimony regarding communications between a husband and wife made in the presence of other parties and finding that it is not a judge’s place to determine the confidentiality of communications between husband and wife because “[t]o enable the court to judge, the communication must be disclosed to the court, and so the mischief intended to be guarded against will be committed in the process of ascertaining whether it is entitled to be guarded against”).

III. WEB-BASED ELECTRONIC MAIL

This Article analyzes the marital communications privilege as it relates to web-based e-mail.⁴³ Web-based e-mail is sent from the writer to the recipient by means of a third party server.⁴⁴ These third parties, ISPs, store and process a user's e-mails.⁴⁵ Rather than accessing an e-mail by downloading it onto her personal computer, a user of web-based e-mail can access the e-mail from any computer via the World Wide Web.⁴⁶ The e-mail message sits on the ISP's server for an undetermined amount of time, sometimes even after the e-mail has been deleted by the recipient.⁴⁷

In recent years, web-based e-mail has become increasingly popular. ISPs like Google, MSN, and Yahoo! have increased the amount of free storage space that they provide to users of their web-based e-mail systems.⁴⁸ As one commentator noted, ISPs will continue to increase storage in order to ensure that customers will use their e-mail services more often and have no reason to delete old e-mails.⁴⁹

Before addressing whether the marital communications privilege prevents law enforcement from accessing e-mails sent via web-based accounts, it is important to determine whether other protections exist. Surprisingly, web-based e-mails are not protected to the extent that one might expect.

A. Privacy Agreements

Most ISPs enter into privacy agreements with their users.⁵⁰ Typically, the privacy agreements address the extent to which ISPs collect users' personal information and provide such information to other parties.⁵¹ For example, the privacy policies provided by Google, Microsoft, and Yahoo! all state that the ISPs

43. E-mail downloaded to a user's home or work computer is outside the purview of this article.

44. See James X. Dempsey, *Digital Search & Seizure: Updating Privacy Protections to Keep Pace with Technology*, 865 PLI/Pat 505, 517 (2006).

45. Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1210 (2004); see also *United States v. Maxwell*, 45 M.J. 406, 417 (C.A.A.F. 1996) (noting that America Online stores its customers' e-mails at a privately-owned computer bank in Vienna, Virginia).

46. Dempsey, *supra* note 44, at 517.

47. *Id.* at 523 ("[S]ince ISPs retain data for varying lengths of time, and do not always delete email immediately upon request, customers may not be aware of whether their email is still stored and thus susceptible to disclosure.").

48. *Id.* at 516-17.

49. *Id.* at 517-18 (citing Janis Mara, *MSN Hotmail Upgrades E-Mail, Increases Storage*, ClickZ, June 24, 2004, <http://www.clickz.com/news/article.php/3372781>).

50. See, e.g., Gmail Privacy Policy (Oct. 14, 2005), <http://gmail.google.com/mail/help/privacy.html> (describing Google's privacy practices, including how Google treats its customers' personal information); Microsoft Online Privacy Statement (Jan. 2006), <http://privacy.microsoft.com/en-us/fullnotice.aspx> (describing Microsoft's customer policies regarding collection, use, sharing, and accessing personal information); Yahoo! Privacy Policy (Mar. 28, 2002), <http://privacy.yahoo.com/privacy/us/> (describing the extent of Yahoo!'s customer privacy protections).

51. See *supra* note 50.

will not sell personal information to third parties, but that the ISPs will provide information in order to comply with the law.⁵²

Most ISP privacy policies contain no information regarding the deletion of e-mails from the ISP server once the e-mail has been deleted from the user's account;⁵³ however, Google's Gmail Privacy Policy notifies customers that deleted e-mail will take immediate effect in the user's account view, but "[r]esidual copies of deleted messages and accounts may take up to 60 days to be deleted from our active servers and may remain in our offline backup systems."⁵⁴ Thus, e-mail that has been deleted from a user's account and is no longer visible in the user's e-mail account view may sit on the ISP's server indefinitely.

Clearly, ISP privacy policies do not provide a great deal of protection to users. The ISPs have reserved the right to comply with subpoenas, warrants, court orders, or other legal process. Thus, as Google notes in the Frequently Asked Questions portion of its Privacy Policy, "the primary protections [users] have against intrusions by the government are the laws that apply to where [they] live."⁵⁵ This Article now addresses those legal protections.

B. Fourth Amendment Protection

The Fourth Amendment to the United States Constitution protects citizens against unreasonable searches and seizures and requires that search warrants be issued only upon a finding of probable cause.⁵⁶ The Supreme Court defines probable cause as "[a] reasonable ground for belief of guilt, . . . and that the belief of guilt must be particularized with respect to the person to be searched or seized."⁵⁷ In order for a person to assert protection under the Fourth Amendment, she must establish that the government violated her legitimate expectation of privacy.⁵⁸ This inquiry has two parts: the person must establish (1) an actual or subjective

52. Google Privacy Policy (Oct. 14, 2005), <http://www.google.com/privacy.html> ("[Google may] share information with third parties in limited circumstances, including when complying with legal process, preventing fraud or imminent harm, and ensuring the security of our network and services."); Microsoft Online Privacy Statement, *supra* note 50 ("We may access and/or disclose your personal information if we believe such action is necessary to: (a) comply with the law or legal process served on Microsoft . . ."); Yahoo! Privacy Policy, *supra* note 50 ("We respond to subpoenas, court orders, or legal process, or to establish or exercise our legal rights or defend against legal claims . . ."); *see also* Dempsey, *supra* note 44, at 523 ("Virtually every privacy policy . . . allows for disclosure in response to a government demand.").

53. *See* Dempsey, *supra* note 44, at 523.

54. Gmail Privacy Policy, *supra* note 50. While Gmail does not promise it will remove deleted e-mails within a certain timeframe, Gmail does state that it "will make reasonable efforts to remove deleted information from our systems as quickly as is practical." About Gmail: More on Gmail and Privacy (June 15, 2004), <http://mail.google.com/mail/help/intl/en/more.html>.

55. Google Privacy FAQ, http://www.google.com/privacy_faq.html (last visited Nov. 14, 2006).

56. U.S. CONST. amend. IV.

57. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (internal quotations and citations omitted).

58. *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

expectation of privacy and (2) an objective expectation of privacy, or “one that society is prepared to recognize as ‘reasonable.’”⁵⁹

Taking into account the Supreme Court’s Fourth Amendment jurisprudence, it is unclear whether the Fourth Amendment provides adequate protection to web-based e-mail accounts. In *United States v. Miller*,⁶⁰ the Court held that a person has no legitimate expectation of privacy in information he voluntarily provides to third parties.⁶¹ The Court reasoned that the government could obtain such information from the third party “even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”⁶² In the Court’s view, when someone provides personal information to third parties, he assumes the risk that the third party will reveal the information to the government.⁶³

Based on *Miller*, several lower courts have found that holders of web-based e-mail accounts have no legitimate expectation of privacy regarding subscriber information provided to ISPs.⁶⁴ Subscriber information includes a user’s name, address, birthday, and password.⁶⁵ More importantly, lower courts have held that once an e-mail message has been delivered to the recipient, the sender has no reasonable expectation of privacy in its contents.⁶⁶ As the Sixth Circuit Court of Appeals has found, once an e-mail reaches its recipient, “the e-mailer would be

59. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see also Smith*, 442 U.S. at 740 (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

60. 425 U.S. 435 (1976), *superseded by statute*, Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3697.

61. *Id.* at 442–43. In *Miller*, the Court found that a bank depositor has no legitimate expectation of privacy in financial information voluntarily provided to his bank and the bank’s employees. *Id.*

62. *Id.* at 443 (citations omitted).

63. *Id.* (citing *United States v. White*, 401 U.S. 745, 752 (1971)).

64. *See Guest v. Leis*, 255 F.3d 325, 336 (6th Cir. 2001) (finding that electronic bulletin board users lacked a Fourth Amendment privacy interest in their subscriber information because they revealed it to a third party); *United States v. Cox*, 190 F. Supp. 2d 330, 332 (N.D.N.Y. 2002) (finding defendant did not show a reasonable expectation of privacy regarding e-mail account information); *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000) (finding no reasonable expectation of privacy in subscriber information); *United States v. Hambrick*, 55 F. Supp. 2d 504, 508–09 (W.D. Va. 1999) (finding no restrictive agreement in the user’s contract with the ISP, so the user had no reasonable expectation of privacy).

65. *Guest*, 255 F.3d at 335.

66. *See United States v. Jones*, 149 Fed. App’x 954, 959 (11th Cir. 2005) (finding no reasonable expectation of privacy in text messages that had reached the recipient); *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) (finding that although individuals possess a reasonable expectation of privacy in their home computers, “[t]hey may not, however, enjoy such an expectation of privacy in transmissions over the Internet or e-mail that have already arrived at the recipient”); *Guest*, 255 F.3d at 333 (finding no reasonable expectation of privacy once e-mail is delivered); *United States v. Charbonneau*, 979 F. Supp. 1177, 1184 (S.D. Ohio 1997) (finding that once the e-mail is received, there is no reasonable expectation of privacy); *United States v. Maxwell*, 45 M.J. 406, 418 (C.A.A.F. 1996) (finding that once an e-mail is delivered, “the transmitter no longer controls its destiny”); *Commonwealth v. Proetto*, 771 A.2d 823, 831 (Pa. Super. Ct. 2001) (finding no expectation of privacy in e-mails forwarded to the police).

analogous to a letter-writer, whose ‘expectation of privacy ordinarily terminates upon delivery’ of the letter.”⁶⁷

Indeed, due to the manner in which ISP searches are conducted, the Fourth Amendment may provide no protection at all to web-based e-mail accounts. As one commentator notes, government investigators do not search the ISPs’ servers directly; rather, the investigators usually provide the ISPs with a grand jury subpoena compelling copies of the users’ e-mails.⁶⁸ The government may issue a grand jury subpoena even if the e-mails are protected by the Fourth Amendment.⁶⁹ Additionally, unlike a search warrant, a grand jury may issue a subpoena in the absence of probable cause.⁷⁰ So long as the subpoena is reasonable, it will comply with the requirements of the Fourth Amendment.⁷¹

C. *The Stored Communications Act*

Most likely realizing the lack of Fourth Amendment protection afforded electronic communications, Congress enacted the Electronic Communications Privacy Act (ECPA) in 1986.⁷² Several provisions of the ECPA concern stored data such as web-based e-mail.⁷³ This portion of the statute is commonly referred to as the Stored Communications Act (SCA).⁷⁴

In enacting the SCA, Congress chose to regulate government access to communications provided by two types of communications services. The first type of service, known as an “electronic communication service” (ECS), entails a provider sending and receiving communications on behalf of the user.⁷⁵ The ECS temporarily stores the communication pending delivery. In most cases, the

67. *Guest*, 255 F.3d at 333 (quoting *United States v. King*, 55 F.3d 1193, 1196 (6th Cir. 1995)).

68. Kerr, *supra* note 45, at 1211.

69. *See In re Subpoena Duces Tecum*, 228 F.3d 341, 347 (4th Cir. 2000).

70. *Id.* at 347–48 (“While the Fourth Amendment protects people ‘against unreasonable searches and seizures,’ it imposes a probable cause requirement only on the issuance of warrants. Thus, unless subpoenas are warrants, they are limited by the general reasonableness standard of the Fourth Amendment[,] . . . not by the probable cause requirement.” (quoting U.S. CONST. amend. IV) (citation omitted)).

71. *Id.* The Supreme Court requires that subpoenas be “sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.” *See v. City of Seattle*, 387 U.S. 541, 544 (1967). Courts reason that subpoenas and warrants should have different standards because the party upon whom the subpoena is served may challenge it before any intrusion occurs. Searches and seizures, on the other hand, are conducted without prior notice. Thus, probable cause is required in order to ensure compliance with the Constitution. *In re Subpoena Duces Tecum*, 228 F.3d at 347–48.

72. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 2510–2712 (2000)); *see also* Kerr, *supra* note 45, at 1212 (“The [ECPA] creates a set of Fourth Amendment-like privacy protections by statute, regulating the relationship between government investigators and service providers in possession of users’ private information.”).

73. *See* 18 U.S.C. §§ 2701–2711. The title of the statute applicable to stored data is known as the Stored Wire and Electronic Communications and Transactional Records Access. *Id.*

74. *See* Dempsey, *supra* note 44, at 521; Kerr, *supra* note 45, at 1208.

75. The statute defines an electronic communications service as “any service which provides to users thereof the ability to send or receive wire or electronic communications.” 18 U.S.C. § 2510(15).

communication is temporarily stored on the provider's server even after delivery.⁷⁶ The second type of service is known as a "remote computing service" (RCS).⁷⁷ When the SCA was enacted in 1986, consumers often used such services to store extra files or process large amounts of data.⁷⁸ RCSs often retained copies of their customers' files for long periods of time.⁷⁹ The main difference between an ECS and an RCS is the amount of time the service stores the user's electronic files. An ECS stores the user's files temporarily while an RCS stores the user's files indefinitely.

The type of protection afforded to an electronic communication turns on two factors: whether the ISP is an ECS or an RCS, and the amount of time the communication has been stored with the provider.⁸⁰ Under the SCA, the government may access a communication stored by an ECS for 180 days or less only pursuant to a warrant issued on the basis of probable cause.⁸¹ If the communication is stored with the ECS for more than 180 days, the government may access it with a subpoena⁸² or a court order,⁸³ but the government must give prior notice to the subscriber.⁸⁴ The standards for government access to communications stored with an RCS are identical to those required for government access to a communication stored for more than 180 days with an ECS.⁸⁵

In sum, electronic communications, like web-based e-mails, are afforded no more protection under the SCA than under the Fourth Amendment unless they have been stored for 180 days or less, and assuming that ISPs who provide web-based e-mails are even considered ECS providers. One commentator has argued that providers of web-based e-mail are multifunctional and can serve as ECS and RCS

76. See Kerr, *supra* note 45, at 1213.

77. The statute defines a remote computing service as "the provision to the public of computer storage or processing services by means of an electronic communications system." 18 U.S.C. § 2711(2).

78. See S. REP. NO. 99-541, at 3 (1986), as reprinted in 1986 U.S.C.C.A.N. 3555, 3557.

79. See *id.*

80. The SCA defines "electronic storage" as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." 18 U.S.C. § 2510(17). Thus, a customer's use of web-based e-mail would be considered electronic storage under the SCA even if the customer deletes the e-mail immediately after reading it. It follows that electronic storage would also include an ISP's retention of an e-mail in a customer's inbox after the customer has read it but not deleted it. Indeed, if the ISP stores a copy of the e-mail for backup purposes even after the customer has deleted it from her inbox, the retention of the e-mail would still be considered electronic storage.

81. 18 U.S.C. § 2703(a) (2000).

82. See *supra* Part III.B (discussing the reasonableness standard for the issuance of subpoenas).

83. For a court order to be issued under the SCA, the government must present "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d).

84. *Id.* § 2703(b)(1)(B). The government may delay notice to the subscriber by up to ninety days upon providing proof that there is reason to believe that notification might have an adverse result, including the destruction of evidence, flight from prosecution, or intimidation of potential witnesses. *Id.* § 2705(a)(1)-(2).

85. *Id.* § 2703(a).

for a single communication at any given time.⁸⁶ For example, a provider that holds an e-mail in intermediate storage until the recipient views the e-mail would be considered an ECS.⁸⁷ As stated earlier, to access such an e-mail, the government would need a search warrant. The warrant requirement under the SCA is identical to the protection the Fourth Amendment provides to e-mails that have not yet been delivered.⁸⁸ However, if the recipient leaves the e-mail in her inbox (and on the ISP's server) after reviewing it, the ISP may be serving as an RCS.⁸⁹ If this characterization is correct, then the government would be allowed to access opened e-mails with a subpoena or a court order, and neither of these authorizations requires probable cause.⁹⁰ Under this scenario, the SCA provides no more protection to opened e-mails than the Fourth Amendment provides.⁹¹

Neither the Fourth Amendment nor the SCA provides a great level of protection for web-based e-mails. The marital communications privilege is the only barrier preventing law enforcement access to confidential spousal communications sent via e-mail. However, as Section IV demonstrates, the very nature of web-based e-mail likely prevents the privilege from attaching at all.

IV. ANALYSIS OF THE MARITAL COMMUNICATIONS PRIVILEGE AS APPLIED TO WEB-BASED E-MAIL

Case law concerning the applicability of the marital communications privilege and the third party presence rule is plentiful. Although courts have not yet addressed whether the privilege applies to web-based e-mail, numerous analogies demonstrate that the marital communications privilege is inapplicable to web-based e-mail under current law.

A. Applicability of the Marital Communications Privilege to Letters

It is quite logical to compare an e-mail to a letter. Both are written forms of communication where a writer drafts and sends a message to a recipient. Thus, if the marital communications privilege applies to letters discovered by third parties,

86. Kerr, *supra* note 45, at 1215–16.

87. See *supra* note 75 and accompanying text; see also *In re DoubleClick, Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 511–12 (S.D.N.Y. 2001) (finding “temporary, intermediate storage” describes an e-mail message being held by a third party).

88. See *supra* note 66 and accompanying text.

89. See Kerr, *supra* note 45, at 1216 (“The traditional understanding has been that a copy of opened e-mail sitting on a server is protected by the RCS rules, not the ECS. rules The thinking is that when an e-mail customer leaves a copy of an already-accessed e-mail stored on a server, that copy is no longer ‘incident to transmission’ nor a backup copy of a file that is incident to transmission: rather, it is just in remote storage like any other file held by an RCS.”) (footnotes omitted). *But see* Theofel v. Farey-Jones, 359 F.3d 1066, 1075 (9th Cir. 2004) (finding e-mails stored on an ISP’s server following delivery are usually stored for backup protection, thereby making the more stringent ECS rules applicable).

90. See *supra* notes 82–84 and accompanying text.

91. See *supra* Part III.B.

then it follows that the privilege should apply to web-based e-mails accessed by ISPs in response to a court order, subpoena, or search warrant. Unfortunately, the case law almost universally states that when a third party discovers the contents of a letter between spouses, the marital communications privilege does not apply.

For example, in *State v. Myers*,⁹² defendant Myers was convicted of voluntary manslaughter, aggravated robbery, and arson.⁹³ On appeal, Myers argued that the trial court erred in admitting into evidence letters he had written to his wife.⁹⁴ The letters contained damaging admissions of Myers's role in the alleged crimes.⁹⁵ The State offered the letters into evidence not through Myers's wife, but through Cassity, a friend of Myers.⁹⁶ Myers's wife had lived in Cassity's basement for a period of time. Three months after Myers's wife moved out of Cassity's basement, Cassity found the letters under a mattress and gave them to another friend who turned them over to law enforcement officers.⁹⁷

The Kansas Supreme Court held that the trial court did not err in allowing the letters into evidence.⁹⁸ The court reasoned that the letters had fallen into Cassity's hands inadvertently and without the connivance of Myers's wife.⁹⁹ The purpose of the marital privilege—to protect the confidential relationship between spouses—would not be thwarted if a third person inadvertently acquires the communication and discloses it.¹⁰⁰ The court also found that construing the marital communications privilege narrowly would ensure that relevant facts remain available to the court unless very specific exceptions apply.¹⁰¹

The result in *Myers* is not unusual. In *State v. Szemple*,¹⁰² the New Jersey Supreme Court considered a similar factual situation. Szemple, charged with first degree murder, wrote a letter to his wife prior to trial.¹⁰³ The letter contained a description of a murder he had committed.¹⁰⁴ Szemple's wife had the letter in her possession when she and her father moved her belongings from one residence to another.¹⁰⁵ During the move, the wife's father discovered the letter and stuck it in his shirt.¹⁰⁶ After reviewing the letter, he turned it over to the prosecutor on the case.¹⁰⁷ Despite Szemple's objection based on the marital communications privilege, the trial court allowed the letter into evidence.¹⁰⁸

92. 640 P.2d 1245 (Kan. 1982).

93. *Id.* at 1246.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 1249.

99. *Id.* at 1248.

100. *Id.* at 1248–49.

101. *See id.* at 1248.

102. 640 A.2d 817 (N.J. 1994).

103. *Id.* at 819.

104. *Id.* at 820.

105. *Id.* at 819.

106. *Id.*

107. *Id.* at 819–20.

108. *Id.* at 820.

In finding that the marital communications privilege did not protect the letter, the *Szemple* court noted that the privilege should be construed narrowly “as its only effect [is] the suppression of relevant evidence.”¹⁰⁹ This approach to the evidentiary privileges, according to the court, justifies the third party presence rule.¹¹⁰ The court reasoned that the privilege does not attach to the communication but to the spouses.¹¹¹ Accordingly, no privilege is violated if the letter comes into the hands of a third party.¹¹² Finally, the court noted that *Szemple* and his wife should have been more cautious. The court stated that *Szemple* knew or should have known that the letter might fall into the hands of a third party because letters, unlike oral conversations, have a “long life.”¹¹³

The outcomes of *Myers* and *Szemple* are consistent with many cases involving inadvertent disclosure of a spousal communication to a third party. For example, in *Ellis v. State*,¹¹⁴ the Alabama Court of Criminal Appeals held that the marital privilege did not apply to the defendant’s suicide note to her husband where it was found on the floor by police officers answering a 911 call.¹¹⁵ The court reasoned that the privilege “does not protect against the testimony of third persons who have . . . secured possession or learned the contents” of the communication.¹¹⁶ In *Metcalf v. State*,¹¹⁷ the defendant wrote a letter to his wife from jail, placed it in an unsealed envelope, and asked a soon-to-be-released inmate to deliver it.¹¹⁸ The Arkansas Supreme Court held that the privilege did not apply because the defendant waived any potential confidentiality by handing over the unsealed letter to another inmate.¹¹⁹ In *Commonwealth v. May*,¹²⁰ the Pennsylvania Supreme Court held that a letter sent from a prison inmate to his wife was not privileged, especially considering that the inmate had signed a form permitting prison guards to review all incoming and outgoing mail.¹²¹ The facts of *May* are particularly analogous to the use of web-based e-mail. The *May* court found the defendant’s agreement with the prison to be determinative on the issue of whether he had a reasonable expectation of confidentiality.¹²² Similar to the defendant in *May*, a user of web-based e-mail signs an agreement granting the ISP the right to review incoming and

109. *Id.* at 821 (quoting MCCORMICK ON EVIDENCE, § 82 (John William Strong, ed., 4th ed. 1992)).

110. *Id.*

111. *Id.* at 822.

112. *Id.*

113. *Id.* at 824. According to the *Szemple* court, “[t]o obtain the benefit of the privilege, spouses must take the precautions necessary to ensure that inter-spousal communications be kept confidential. When they fail to do so, the privilege is lost.” *Id.*

114. 570 So. 2d 744 (Ala. Crim. App. 1990).

115. *Id.* at 759.

116. *Id.* (quoting MCCORMICK ON EVIDENCE, § 82 (Edward W. Cleary ed., 3d ed. 1984)).

117. 681 S.W.2d 344 (Ark. 1984).

118. *Id.* at 346.

119. *Id.*

120. 656 A.2d 1335 (Pa. 1995).

121. *Id.* at 1342.

122. *Id.*

outgoing messages.¹²³ Thus, a court would find that a user of web-based e-mail has no viable claim of confidentiality in messages sent via the Internet. Finally, the facts of *Wofle v. United States*¹²⁴ are instructive. As stated earlier, *Wofle* involved a defendant who wrote a letter to his wife via his personal stenographer.¹²⁵ The Supreme Court held that the defendant's decision to involve his stenographer in the communication prevented the privilege from attaching.¹²⁶

Most of the scenarios mentioned above involve the inadvertent and sometimes careless disclosure of confidential communications to a third party by one of the spouses. Additionally, some of the scenarios involve the intentional disclosure to the third party on the part of the communicating spouse.¹²⁷ A comparison of letters to web-based e-mails makes sense regardless of whether the disclosure to the third party is inadvertent or intentional. Even if a third party intentionally seeks to discover the content of the communication, no violation of the privilege will occur. When the writer of a web-based e-mail fails to protect the privilege by intentionally or inadvertently disclosing the e-mail to the ISP, the case law regarding the applicability of the privilege to letters indicates that the privilege would never apply to web-based e-mail—disclosure of the communication is necessary for a writer to successfully send an e-mail message.

B. Applicability of the Marital Communications Privilege to Oral Communications

The case law regarding application of the marital communications privilege to oral communications typically involves either live conversations overheard by a third party or recorded messages discovered by a third party. Web-based e-mail is probably more analogous to recorded messages, considering that both forms of communication can be preserved and fall into the hands of a third party. However, the distinction between live and recorded conversations makes no difference. Both forms of communication, if overheard or discovered by a third party, are outside the protection of the marital communications privilege.

In *Proffitt v. State*,¹²⁸ the Florida Supreme Court considered Proffitt's first degree murder conviction.¹²⁹ At trial, the prosecution offered into evidence an oral conversation between Proffitt and his wife wherein Proffitt confessed that he had killed a man.¹³⁰ The state offered evidence of the conversation through the testimony of Bassett, a woman who rented a room in Proffitt's two-bedroom mobile

123. See *supra* Part III.A.

124. 291 U.S. 7 (1934).

125. *Id.* at 12; see *supra* notes 18–21 and accompanying text.

126. *Wofle*, 291 U.S. at 16–17.

127. Recall that intentional disclosure on the part of the recipient-spouse typically will not destroy the privilege. See *supra* notes 27–28 and accompanying text.

128. 315 So. 2d 461 (Fla. 1975), *aff'd*, 428 U.S. 242, 260 (1976).

129. *Id.* at 463.

130. *Id.*

home.¹³¹ Although Bassett was not in Proffitt's room during the conversation, she was able to hear certain segments of the conversation.¹³²

In holding that the conversation was not privileged, the court found that the Proffitts knew or should have known there was a possibility their conversation was being overheard.¹³³ The court noted that the Proffitts must have realized Bassett resided in the trailer because she made rental payments each month.¹³⁴ Additionally, the court found that the Proffitts did not attempt to keep their voices low because Bassett heard their conversation through her closed door.¹³⁵ These facts, in the court's opinion, demonstrated the Proffitts failed to take adequate steps to protect the confidentiality of their conversation.¹³⁶

A conversation overheard by a third party will remain unprivileged even if the third party intentionally eavesdrops on the conversation. Consider *Horn v. State*,¹³⁷ in which Horn was convicted of second degree murder.¹³⁸ At trial, the state offered the testimony of Joyce Walker, who worked as a nurse alongside Horn's wife. Walker testified regarding a telephone conversation that occurred between Horn and his wife while his wife was at work.¹³⁹ According to Walker, Mrs. Horn was alerted that she had a telephone call while she was conversing with Walker. When Mrs. Horn picked up the telephone, Walker lifted another telephone receiver without Mrs. Horn's knowledge and listened to the conversation.¹⁴⁰ Walker testified that she eavesdropped on the conversation because she was "being nosy."¹⁴¹

On appeal, Horn asserted that the trial court erred in admitting Walker's testimony because the conversation was protected by the marital communications privilege.¹⁴² The Florida Court of Appeals found that conversations overheard by a third party are not privileged, regardless of whether the third party acts "surreptitiously or openly."¹⁴³ Thus, the conversation between Horn and his wife

131. *Id.*

132. *Id.*

133. *Id.* at 465.

134. *Id.*

135. *Id.*

136. *Id.*; accord *Nash v. Fidelity-Phenix Fire Ins. Co.*, 146 S.E. 726, 727 (W. Va. 1929) (finding a conversation between spouses overheard by a boarder not privileged); see also *State v. Summerlin*, 675 P.2d 686, 694 (Ariz. 1983) (holding that conversations between defendant and his wife while police officers were present were not privileged communications).

137. 298 So. 2d 194 (Fla. Dist. Ct. App. 1974).

138. *Id.* at 195.

139. *Id.*

140. *Id.*

141. *Id.* at 195–96.

142. *Id.* at 196.

143. *Id.* at 196 (quoting Annotation, *Effect of Knowledge of Third Person Acquired by Overhearing or Seeing Communication Between Husband and Wife Upon Rule as to Privileged Communication* 63 A.L.R. 107, 108–09 (1929)).

was not protected by the privilege.¹⁴⁴ This approach to eavesdropping by third parties is consistent with a very narrow application of the privilege.¹⁴⁵

Likewise, case law indicates that recorded conversations are not privileged when a third party gains access to the recording. In *Wong-Wing v. State*,¹⁴⁶ the defendant was charged with two counts of child sexual abuse.¹⁴⁷ The State offered into evidence the transcript and recording of a message the defendant had left his wife on her answering machine.¹⁴⁸ The defendant objected on the basis of the spousal privilege.¹⁴⁹ The Maryland Court of Special Appeals found that the message was not privileged because the defendant left the message on an answering machine in a home his wife shared with her daughter and mother.¹⁵⁰ According to the court, “when appellant left the message on the answering machine, he ran the risk that someone other than [his wife] would retrieve the message.”¹⁵¹

The analogy between oral conversations and web-based e-mail is fairly sound. Similar to the live conversation in *Proffitt* and the recorded message in *Wong-Wing*, a person who chooses to draft a web-based e-mail has failed to take precautions to prevent a third party from accessing the message. The writer deposits the e-mail communication with the ISP, thereby running the risk that the ISP could access the message and turn it over to the government. As demonstrated in *Horn*, even if the ISP intentionally seeks to learn the content of the message, the privilege would not apply to web-based e-mails based on the application of the privilege to oral conversations.¹⁵²

C. *The Effect of E-mail on Applicability of the Professional Privileges*

It is further helpful to draw an analogy between the marital communications privilege and the other evidentiary privileges, hereinafter referred to as the “professional privileges.” These privileges include the privileges between attorney and client, physician and patient, psychotherapist and patient, and clergy and communicant. Case law regarding the latter three privileges and the effect that communication via e-mail might have on their applicability is virtually non-existent. However, much commentary and a few court opinions have addressed whether the use of e-mail vitiates the attorney-client privilege. Before discussing whether it is appropriate to draw an analogy between the marital communications

144. *Id.* Ultimately, the court held that Walker’s testimony regarding the conversation was inadmissible because she violated Florida’s wiretap statute by eavesdropping on the conversation. *Id.* at 198–99.

145. *See State v. Thorne*, 260 P.2d 331, 336 (Wash. 1953) (“If the communication is heard by a third party, even if by eavesdropping, the third party may testify to it, since the privilege protects only successful confidences.”) (citations omitted).

146. 847 A.2d 1206 (Md. Ct. Spec. App. 2004).

147. *Id.* at 1208.

148. *Id.* at 1210.

149. *Id.*

150. *Id.* at 1213.

151. *Id.*

152. *See supra* notes 137–44 and accompanying text.

privilege and the professional privileges, this Article explores what effect the use of e-mail has on the application of the attorney-client privilege.

1. *E-mail and the Attorney-Client Privilege*

The attorney-client privilege, according to the Supreme Court, is “the oldest of the privileges for confidential communications known to the common law.”¹⁵³ The purpose of the privilege is to promote open and full communication between attorney and client, “thereby promot[ing] broader public interests in the observance of law and the administration of justice.”¹⁵⁴ Some nuances of the attorney-client privilege vary depending on jurisdiction, but the privilege arises under these general circumstances:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.¹⁵⁵

Under federal law, “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client”¹⁵⁶

Several legal commentators and some court opinions have addressed whether the use of e-mail, by its nature, will result in waiver of the attorney client privilege. In *In re Asia Global Crossing, Ltd.*,¹⁵⁷ the court addressed whether the officers of a bankrupt corporation waived any privilege they may have had in communications between themselves and their personal attorneys when the officers communicated with the attorneys via the corporate e-mail system.¹⁵⁸ Apparently, the e-mails concerned potential disputes between the officers and the debtor-corporation.¹⁵⁹ The debtor-corporation’s bankruptcy trustee claimed the communications that were

153. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing WIGMORE, *supra* note 27, § 2290).

154. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn Co.*, 449 U.S. at 389).

155. WIGMORE, *supra* note 27, § 2292 (emphasis omitted).

156. *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 236 (1972) (Proposed Rule 503). Although Rule 503 was never enacted, many courts cite this Rule with authority. See, e.g., *Ross v. City of Memphis*, 423 F.3d 596, 601 (6th Cir. 2005) (“While Congress did not adopt any of the proposed rules concerning various privileges, courts have observed that Proposed Rule 503 is ‘a useful starting place’ for an examination of the federal common law of attorney-client privilege’ . . . [because the rule] . . . ‘restates, rather than modifies, the common-law lawyer-client privilege.’”) (citations omitted).

157. 322 B.R. 247 (Bankr. S.D.N.Y. 2005).

158. *Id.* at 253.

159. *Id.* at 256.

stored on the debtor-corporation's e-mail servers were not privileged simply due to the fact that they were sent by way of e-mail, which carries an inherent risk of unauthorized disclosure.¹⁶⁰ The court found that, although e-mail carries some risk of unauthorized disclosure, the prevailing view is that communication through e-mail offers a reasonable expectation of privacy.¹⁶¹ Therefore, according to the court, a client's decision to communicate with her attorney via e-mail does not, without more, constitute waiver of the privilege.¹⁶²

The Nevada Supreme Court made an identical ruling in *City of Reno v. Reno Police Protective Ass'n*.¹⁶³ In *City of Reno*, a union organization sued the city, claiming unfair labor practices.¹⁶⁴ The state labor relations board admitted into evidence a document authored by the city's labor relations manager and sent to the city's attorney as an e-mail attachment.¹⁶⁵ The city claimed that the attorney-client privilege applied to the document, but the labor relations board argued that documents sent by e-mail cannot be protected by the attorney-client privilege.¹⁶⁶ The Nevada Supreme Court disagreed, finding that "a document transmitted by e-mail is protected by the attorney-client privilege as long as the requirements of the privilege are met."¹⁶⁷

In making their rulings, the courts in *In re Asian Global Crossing* and *City of Reno* relied on American Bar Association (ABA) and state bar association opinions finding that communication by way of unencrypted e-mail does not violate a lawyer's ethical obligation to maintain client confidentiality.¹⁶⁸ Both opinions cited ABA Opinion 99-413, issued in March 1999.¹⁶⁹ Although the ABA opinion deals with client confidentiality under the Model Rules of Professional Conduct,¹⁷⁰ some legal commentators and court opinions have cited ABA Opinion 99-413 as persuasive authority on the issue of whether the mere use of unencrypted e-mail

160. *Id.* at 253.

161. *Id.* at 256.

162. *Id.* at 256.

163. 59 P.3d 1212, 1218 (Nev. 2002).

164. *Id.* at 1215.

165. *Id.* at 1215.

166. *Id.* at 1218-19.

167. *Id.* at 1218.

168. See *In re Asian Global Crossing, Ltd.*, 322 B.R. 247, 256 (Bankr. S.D.N.Y. 2005) (citing as examples Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2000-1, (2000), available at http://www.nycbar.org/Ethics/eth2000_1.htm; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999) [hereinafter ABA Op. 99-413]; N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 709 (1998), available at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Ethics_Opinions/Committee_on_Professional_Ethics_Opinion_709.htm; and citing for support *City of Reno*, 59 P.3d at 1218 (citing ABA Op. 99-413, *supra*). Encryption is defined as "a method of electronically or digitally coding a message sent online, whereby only the intended recipient can unlock the code and read the message." Audrey Jordan, Note, *Does Unencrypted E-Mail Protect Client Confidentiality?*, 27 AM. J. TRIAL ADVOC. 623, 624 (2004).

169. See cases cited *supra* note 168.

170. Model Rule 1.6(a) states, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2003).

vitiate the attorney-client privilege.¹⁷¹ While acknowledging that e-mail communications have some inherent security problems, the opinion found that e-mail “pose[s] no greater risk of interception or disclosure than other modes of communication commonly relied upon as having a reasonable expectation of privacy.”¹⁷² The ABA’s blanket statement that all e-mail transmissions afford a reasonable expectation of privacy is nothing less than a gross generalization.¹⁷³ However, the ABA and state bar associations¹⁷⁴ likely have found a reasonable expectation of privacy to exist so that attorneys would not be forced to purchase

171. See *supra* note 168 and accompanying text; see also Dion Messer, *To: Client@Workplace.com: Privilege at Risk?*, 23 J. MARSHALL J. COMPUTER & INFO. L. 75, 75 n.2 (2004). The Maryland Court of Appeals explored the relationship between Rule 1.6 and the attorney-client privilege in *Newman v. State*, 863 A.2d 321, 331–37 (Md. 2004). The court noted that “[t]he principle of confidentiality is given effect in both bodies of law. The attorney-client privilege applies in judicial and other proceedings in which an attorney may be called as a witness or otherwise required to produce evidence adverse to his client,” while Rule 1.6 “applies in all other situations that do not involve the compulsion of law.” *Id.* at 332 (citations omitted). Indeed, the court noted that Rule 1.6 has a broader application than the attorney-client privilege because the rule “is not limited to ‘matters communicated in confidence by the client but also to all information related to the representation,’ whether obtained from the client or through the attorney’s independent investigation . . .” *Id.* (quoting MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt.).

172. ABA Op. 99–413, *supra* note 168.

173. See *supra* Part III.B. The ABA also stated in its opinion that the ECPA provides adequate protection for e-mails accessed by third parties. ABA Op. 99–413, *supra* note 168. However, as this article demonstrates, the ECPA does not provide a great deal of protection to e-mails stored on ISP servers. See *supra* Part III.C.

174. Several state bar associations have opined that the use of unencrypted e-mail does not violate an attorney’s ethical duty to protect client confidences. See Alaska Bar Ass’n Ethics Comm., Op. 98–2 (1998), available at <http://www.alaskabar.org/ada.cfm?id=4871>; State Bar of Ariz. Comm. on the Rules of Prof’l Conduct, Op. 97–04 (1997), available at <http://www.myazbar.org/ethics/printop.cfm?id=480>; Del. State Bar Ass’n Comm. on Prof’l Ethics, Op. 2001–2 (2001), available at <http://www.dsba.org/AssocPubs/PDFs/2001-2.pdf>; D.C. Bar Legal Ethics Comm., Op. 281 (1998), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion281.cfm; Haw. Office of Disciplinary Counsel, Formal Op. 40 (2001), http://www.hsba.org/Legal_Research/Hawaii/Disc/FormalOpinion40.pdf; Iowa Supreme Court Board of Prof’l. Ethics & Conduct, Op. 97–01 (1997), available at <http://www.iowabar.org/main.nsf/> (follow “Professional Ethics” hyperlink; then follow “Ethics Opinions” hyperlink; then follow the first “09/18/1997” hyperlink); Ky. Bar Ass’n, Ethics Op. E–403 (1998), available at http://www.kybar.org/documents/ethics_opinions/kba_e-403.pdf; Mass. Bar Ass’n Comm. on Prof’l Ethics, Op. 00–1 (2000), available at http://www.massbar.org/publications/ethics_opinions/ (choose “Opinions for the Year of 2000”; follow “Read More” hyperlink for Opinion No. 00–1); Minn. Lawyers Prof’l Resp. Board, Op. 19 (1999), available at <http://www.courts.state.mn.us/lpr/op19.html>; N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 709 (1998), available at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Ethics_Opinions/Committee_on_Professional_Ethics_Opinion_709.htm; N.C. State Bar, RPC 215 (1995), available at <http://www.ncbar.com/ethics/> (choose RPC 215 in “Select by Number” field); Board of Comm’rs on Grievances & Discipline, Supreme Court of Ohio, Op. 99–2 (1999), available at http://www.sconet.state.oh.us/BOC/Advisory_Opinions/1999/op_99-002.doc; S.C. Bar Ethics Advisory Comm., Op. 97–08 (1997), available at <http://www.scbar.org/member/opinion.asp?opinionID=469>; Board of Prof’l. Resp. of the Supreme Court of Tenn., Advisory Op. 98–A–650(a) (1998), available at <http://www.tba.org/news/encrypt.html>; Utah State Bar Ethics Advisory Opinion Comm., Op. 00–01 (2000), available at http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_00_01.html; Vt. Bar Ass’n, Advisory Ethics Op. 97–05 (1997), available at http://www.vtbar.org/ezstatic/data/vtbar/attorney_judicial_resources/advisory_ethics_opinions/1997/97-05.pdf.

expensive encryption software or completely discontinue the use of e-mail to communicate with clients.¹⁷⁵

Despite some problems with the reasoning behind ABA Opinion 99-413, it is clear that state bar associations and some courts have relied upon the opinion in finding that the use of unencrypted e-mail does not prevent the attorney-client privilege from attaching. Thus, assuming that the analogy between the marital communications privilege and the attorney-client privilege is proper, the use of web-based e-mail would not endanger the privilege. Next, this Article explores whether the marital communications privilege should be analogized to the attorney-client privilege or any of the other evidentiary privileges.

2. *A Comparison of the Marital Communications Privilege to the Other Evidentiary Privileges*

The attorney-client, physician-patient, psychotherapist-patient, and clergy-communicant privileges are both similar and dissimilar to the marital communications privilege. The general principles of the attorney-client privilege have already been discussed.¹⁷⁶ The physician-patient privilege protects from disclosure confidential communications made by a patient to his physician for the purpose of medical treatment.¹⁷⁷ “The purpose of the privilege is to encourage patients’ full disclosure of information, which will enable medical providers to extend the best medical care possible.”¹⁷⁸

It must be noted that the federal courts do not recognize a physician-patient privilege.¹⁷⁹ Indeed, in its proposed codification of the evidentiary privileges in 1972, the Judicial Conference Advisory Committee on the Rules of Evidence

175. See Helen W. Gunnarsson, *Should Lawyers Use E-Mail to Communicate with Clients?*, 92 ILL. B.J. 572, 576 (2004) (stating that some in the legal community feel “[i]t doesn’t make sense . . . to impose restrictions on the use of e-mail so onerous that they would destroy its utility”). Clearly, an encryption requirement would hurt the legal profession, due to the cost of such software and the prevalence of e-mail usage in the legal profession. Messer, *supra* note 171, at 75 (citing Kathryn A. Thompson, ABA Legal Resource Center, Technology Snapshot: The Results Are In, Presented at the ABA Techshow, Chi., Ill. (Apr. 4, 2003), http://www.lawtechnology.org/presentations/techshow2003/techshow2003_files/frame.htm) (stating that a 2003 technology survey revealed that 80% of attorneys use e-mail one or more times a day and that 96% of those lawyers use e-mail for correspondence with clients and colleagues).

176. See *supra* Part IV.C.1.

177. See, e.g., COLO. REV. STAT. § 13-90-107(1)(d) (2006) (stating that information acquired in attending to a patient is privileged); IND. CODE ANN. § 34-46-3-1 (LexisNexis 1998) (stating that matters communicated to a physician in the course of professional business are protected); MINN. STAT. ANN. § 595.02(d) (West 2000) (stating that information acquired while attending the patient is privileged).

178. *State v. Gillespie*, 710 N.W.2d 289, 297 (Minn. Ct. App. 2006) (citing *State v. Staat*, 192 N.W.2d 192, 195 (Minn. 1971)).

179. See *Whalen v. Roe*, 429 U.S. 589, 602 n.28 (1977) (“The physician-patient evidentiary privilege is unknown to the common law. In States where it exists by legislative enactment, it is subject to many exceptions and to waiver for many reasons.”); *Patterson v. Caterpillar, Inc.*, 70 F.3d 503, 506–07 (7th Cir. 1995) (“Unfortunately for [the plaintiff], federal common law does not recognize a physician-patient privilege.”).

conspicuously left out any rule of privilege protecting the physician-patient relationship.¹⁸⁰ The Committee reasoned that a general physician-patient privilege was unnecessary so long as a psychotherapist-patient privilege was codified.¹⁸¹ The United States Supreme Court apparently agrees with this position. While the Court has found that the existence of the psychotherapist-patient privilege is necessary for proper diagnosis and treatment,¹⁸² it has stated that “[t]reatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests.”¹⁸³

The psychotherapist-patient privilege, recognized by the federal courts and many state courts, protects from disclosure confidential communications between a patient and her psychologist, social worker, or licensed counselor when such communications assist the professional in making a complete diagnosis.¹⁸⁴ The California legislature stated the privilege’s purpose:

Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient’s life. . . . Unless a patient . . . is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment . . . depend[.].¹⁸⁵

Finally, the clergy-communicant¹⁸⁶ privilege protects communications made to a member of the clergy during the course of spiritual counseling or advice.¹⁸⁷ Similar to the purposes of the other professional privileges, the purpose of the

180. See *Rules of Evidence for United States Courts & Magistrates*, 56 F.R.D. 183, 241–42 (Proposed Rule 504 advisory committee’s note 1972).

181. *Id.* at 242.

182. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996).

183. *Id.* at 10.

184. See, e.g., CAL. EVID. CODE § 1012 (West 2006) (stating that psychotherapist and patient communications are privileged); IOWA CODE ANN. § 622.10 (West 1999) (stating that mental health professionals who obtain information in the course of their employment are not allowed to disclose that information); ME. REV. STAT. ANN. tit. 32, §§ 7005, 13862 (1999) (stating that client-social worker and client-counselor relationships are privileged); MINN. STAT. ANN. § 595.02(g) (West 2000) (stating that information obtained by psychologists or social workers engaged in psychological assessments is privileged); WASH. REV. CODE ANN. § 18.83.110 (West 2006) (stating that communications between client and psychotherapist are privileged).

185. CAL. EVID. CODE § 1014 S. Judiciary Comm. cmt. (West 1995), *quoted in* *San Diego Trolley, Inc. v. Superior Court*, 105 Cal. Rptr. 2d 476, 480 (Ct. App. 2001).

186. The terminology *clergy-communicant* is used in lieu of *priest-penitent* in order to acknowledge that the privilege applies not only to “Roman Catholic priests and their penitents, but also communications between clergy and communicants of other denominations.” *In re Grand Jury Investigation*, 918 F.2d 374, 384–85 (3d Cir. 1990).

187. See FLA. STAT. ANN. § 90.505 (West 1999); 735 ILL. COMP. STAT. ANN. 5/8-803 (West 2003); WASH. REV. CODE ANN. § 5.60.060(3) (West Supp. 2006); see also *In re Grand Jury Investigation*, 918 F.2d at 384 (finding that the privilege exists at federal common law).

clergy-communicant privilege is to encourage the exercise of religious duty and assist clergy members in performing their counseling duties.¹⁸⁸

At first glance, each of the professional privileges appears to be quite similar to the marital communications privilege. After all, each privilege seeks to protect confidential information. However, a closer look at the purposes and application of the privileges reveals that the marital communications privilege is different from the others, and these differences contradict the argument that courts should treat all of the evidentiary privileges in the same manner.

The marital communications privilege is different from the professional privileges in several ways. The origins of the marital communications privilege are unique. Unlike the professional privileges, which originally existed to encourage confidential communications between certain parties,¹⁸⁹ the marital privilege's original purpose was to ensure that spouses would not have to face the humiliation and embarrassment of testifying against each other.¹⁹⁰ The confidential communications aspect of the privilege was not officially recognized until 1934, many years after the Supreme Court recognized the testimonial aspect of the privilege.¹⁹¹ At least one commentator has noted that, due to the different origins of the two aspects of the marital privilege, case law regarding the marital communications privilege is unhelpful in predicting how a court would rule on the other privileges.¹⁹²

This difference in origin between the marital communications privilege and the professional privileges could also explain the difference in application of the third party presence rule. As demonstrated earlier, the third party presence rule prevents the marital communications privilege from attaching where a third party is present during an otherwise confidential communication between spouses.¹⁹³ Courts have applied the third party presence rule in the context of the professional privileges, but the application has been less severe. With regard to the attorney-client privilege, for example, courts recognize that the presence of a third party during communications between an attorney and her client will generally waive the privilege.¹⁹⁴ However, if the third party is an agent of the attorney or someone retained to aid in the preparation of the client's case, then the privilege will apply.¹⁹⁵

188. *State v. Potter*, 478 S.E.2d 742, 755 (W. Va. 1996).

189. *See supra* notes 153–56, 177–88 and accompanying text.

190. *See supra* note 11 and accompanying text.

191. *See supra* notes 13–14 and accompanying text.

192. Hundley, *supra* note 6, at 265–66 n.9.

193. *See supra* text accompanying notes 16–24.

194. *See, e.g., Clagett v. Commonwealth*, 472 S.E.2d 263, 270 (Va. 1996) (finding a conversation between attorney and defendant in the hallway outside a courtroom unprivileged where the state's forensic expert overheard the conversation and reported its details to the prosecutor).

195. *See, e.g., PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, 838 A.2d 135, 167 n.28 (Conn. 2004) (“We have recognized, however, that ‘[t]he presence of certain third parties . . . who are agents or employees of an attorney or client, and who are necessary to the consultation, will not destroy the confidential nature of the communications.’” (quoting *Olson v. Accessory Controls & Equip. Corp.*, 757 A.2d 14, 22 (Conn. 2000))); *State v. Soto*, 933 P.2d 66, 77 (Haw. 1997) (stating that the key to determining whether the presence of a third party waives the privilege will turn on whether client and

In fact, some courts have held that even where the third parties are not present at the request of the attorney, their presence may not vitiate the privilege if the client “‘reasonably understood the conference to be confidential’ *notwithstanding* the presence of third parties.”¹⁹⁶ For example, in *Rosati*, the Rhode Island Supreme Court held that the presence of a child defendant’s parents during conversations with his attorney did not prevent application of the attorney-client privilege to those conversations.¹⁹⁷ Noting the parents’ “vital” role as the child’s confidants, the court found that the child reasonably and unequivocally intended that the conversations remain confidential.¹⁹⁸ Indeed, even when the third party is neither an agent of the attorney nor a confidant of the client, it has been held that a third party’s presence will not destroy the attorney-client privilege when the third party is serving as a translator or interpreter in order to facilitate the communication between attorney and client.¹⁹⁹

Likewise, the physician-patient privilege generally will not attach where a third party is present.²⁰⁰ However, the privilege does apply when the third party is present to “aid physicians or transmit information to physicians on behalf of patients.”²⁰¹ Additionally, when the third party’s presence is required by law, courts have held that any communications between physicians and patients overheard by the third party will remain privileged.²⁰² For example, where a police officer escorted the defendant to the hospital following a car accident, the court held that communications between the defendant and his nurse while in the presence of the officer were privileged.²⁰³

attorney “knew or should have known that there was no reasonable expectation of confidentiality” due to the presence of the third party (quoting *United States v. Melvin*, 650 F.2d 641, 646 (5th Cir. 1981)); *People v. Osorio*, 549 N.E.2d 1183, 1185–86 (N.Y. 1989) (holding that the presence of a third party typically waives the privilege, but recognizing that “[a]n exception exists for statements made by a client to the attorney’s employees or in their presence because clients have a reasonable expectation that such statements will be used solely for their benefit and remain confidential”); *Floyd v. Floyd*, 365 S.C. 56, 90, 615 S.E.2d 465, 483 (Ct. App. 2005) (“The privilege may extend to agents of the attorney.”).

196. *Rosati v. Kuzman*, 660 A.2d 263, 266–67 (R.I. 1995), *quoted in* *Newman v. State*, 863 A.2d 321, 333 (Md. 2004) (internal quotation marks omitted).

197. *Id.* at 267.

198. *Id.*

199. *See Osorio*, 549 N.E.2d at 1185–86.

200. *People v. Covington*, 19 P.3d 15, 20 (Colo. 2001) (citing *People v. Deadmond*, 683 P.2d 763, 770 (Colo. 1984)).

201. *Darnell v. State*, 674 N.E.2d 19, 21 (Ind. Ct. App. 1996) (citing *Springer v. Byram*, 36 N.E. 361, 363 (Ind. 1894)); *accord* *State v. Gillespie*, 710 N.W.2d 289, 298 (Minn. Ct. App. 2006) (stating that a third party’s presence vitiates the physician-patient privilege unless the third party is “a necessary and customary participant in the consultation or treatment” (citing *State v. Kunz*, 457 N.W.2d 265, 267 (Minn. Ct. App. 1990))).

202. *See, e.g., People v. Jaffarian*, 799 N.Y.S.2d 733, 735 (N.Y.J. Ct. 2005) (finding that the required presence of a custodial police officer did not vitiate the physician-patient privilege).

203. *Id.*

In the context of the psychotherapist-patient privilege, the presence of a third party generally will prevent application of the privilege.²⁰⁴ However, when two patients are participating in a joint counseling session, the privilege will attach.²⁰⁵ Additionally, the third party presence rule works almost identically to the third party presence rule in the context of the physician-patient privilege. Each of the privileges will attach when the third party is a necessary and customary participant in the consultation or treatment of the patient.²⁰⁶

Even in the context of the clergy-communicant privilege, which traditionally applied to a penitent's private confessions to his priest,²⁰⁷ the modern view of the privilege holds that a third party's presence will not destroy the privilege where the third party is "essential to and in furtherance of" a communication between clergy and communicant.²⁰⁸ For example, when a member of the clergy has a group discussion with five unrelated persons, the privilege would still apply if all parties present were essential to the facilitation of the communication.²⁰⁹ In determining whether a third party is essential to the furtherance of the communication, the Third Circuit has held that courts must inquire into the nature of the communicant's relationship to the third party as well as the pastoral counseling practices of the clergy members in the relevant religious denomination.²¹⁰

Only in the context of the marital communications privilege do courts apply the third party presence rule virtually without exception.²¹¹ Several explanations exist

204. *Redding v. Virginia Mason Med. Ctr.*, 878 P.2d 483, 485 (Wash. Ct. App. 1994); *accord* *State v. Branch-Wear*, 695 A.2d 1169, 1174 (Me. 1997) (finding statements made in front of third parties are not privileged).

205. *Redding*, 878 P.2d at 486; *accord* *City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist.*, 617 N.W.2d 11, 22 (Iowa 2000) (finding that the presence of third parties during group counseling sessions did not defeat the privilege).

206. *See supra* note 201 and accompanying text; *see also* *State v. Gullekson*, 383 N.W.2d 338, 340 (Minn. Ct. App. 1986) (stating that the psychotherapist-patient privilege will attach where the third party is necessary (quoting *State v. Andring*, 342 N.W.2d 128, 133 (Minn. 1984))).

207. *In re Grand Jury Investigation*, 918 F.2d 374, 386 (3d. Cir. 1990).

208. *Id.*; *accord* *People v. Campobello*, 810 N.E.2d 307, 321 (Ill. App. Ct. 2004) ("[A]n admission or confession is not privileged if made to a clergy member in the presence of a third person unless such person is 'indispensable' to the counseling or consoling activity of the clergy member." (citing *People v. Diercks*, 411 N.E.2d 97, 101 (Ill. App. Ct. 1980))).

209. *In re Grand Jury Investigation*, 918 F.2d at 386–87.

210. *Id.* at 387. The Third Circuit noted that delving into the pastoral counseling practices of a particular denomination poses no First Amendment problem:

[W]e believe that establishing the pastoral counseling practices of a particular denomination to ascertain the types of communications that the denomination deems spiritual and confidential is both a necessary and a constitutionally inoffensive threshold step in determining whether a privilege interdenominational in nature applies in light of the facts and circumstances of a particular case.

Id. at 387 n.21.

211. *See supra* Part IV.A–B. Note that third party presence will not destroy the marital communications privilege where the third party is incapable of understanding the communication. *See* *State v. Bohon*, 565 S.E.2d 399, 403–04 (W. Va. 2002) (holding that the presence of a married couple's eight-month-old child during confidential spousal communications did not vitiate the privilege). *But see* *State v. Muenick*, 498 N.E.2d 171, 173 (Ohio Ct. App. 1985) (finding the marital communications privilege inapplicable to statements made in the presence and hearing of the couple's ten- and eleven-

for the difference in treatment. First, because the marital privilege originated from society's distaste for requiring one spouse to betray the other,²¹² society may be less concerned if a third party is able to disclose the communication without the assistance or connivance of the recipient-spouse.²¹³

Additionally, courts may apply the third party presence rule more strictly in the context of the marital communications privilege because the marital privilege is more limited than the professional privileges. In *Glover v. State*,²¹⁴ the Indiana Supreme Court found that the marital communications privilege does not apply as broadly as the professional privileges, in part because promoting disclosure between the parties is not the primary purpose of the marital communications privilege.²¹⁵ The court noted that the existence of the professional privileges facilitates open communication between the professionals and their clients.²¹⁶ The marital communications privilege, on the other hand, exists to ensure the health of marriages and prevent marital conflict.²¹⁷ The court found that "[a] desire to promote disclosure between spouses may be a secondary consideration in support of the marital privilege, but that factor is less critical than the need of an attorney to counsel or a doctor to treat based on complete and accurate information."²¹⁸ Thus, if it is true that marital harmony, rather than the promotion of confidential disclosure, is the primary purpose of the marital communications privilege, it follows that the disclosure of spousal communications by third parties should not implicate the privilege.

The most likely reason for the difference in application of the third party presence rule in the context of the marital communications privilege centers on the idea of necessity. With regard to the professional privileges, the theme of necessity is present in the court decisions allowing the privileges to apply despite the presence of third parties. Where the third party is present to assist the

year-old sons).

212. See *supra* notes 10, 14; see also CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 5.31, at 397 (3d ed. 2003) ("It is repellant to force husband or wife to breach the trust of marriage by becoming the instrument of the other's criminal conviction.").

213. See *Hundley*, *supra* note 6, at 265 n.9 (stating that courts likely enforced the third party rule based on the assumption that a husband would not physically abuse his wife for disclosing confidential communications if a third party testifies regarding the communication).

214. 836 N.E.2d 414 (Ind. 2005).

215. *Id.* at 421.

216. *Id.*

217. *Id.*

218. *Id.* But see *Ulibarri v. Superior Court*, 909 P.2d 449, 454 (Ariz. Ct. App. 1995) (noting that professional communications have the ethical and disciplinary rules of each profession as an additional source of protection). The court stated that "[b]ecause there is no corresponding set of ethical and disciplinary rules for the marital relationship, judicial enforcement of the marital communications privilege is all that protects a spouse from being compelled to testify about marital communications." *Id.* (citation omitted). If this reasoning is correct, it could be argued that the marital communications privilege, the most vulnerable of all privileges, should be applied more broadly than the professional privileges.

professional,²¹⁹ comfort the layperson,²²⁰ comply with the requirements of the law,²²¹ or further the communication itself,²²² each of the professional privileges will attach because the third party's presence is necessary. As the Supreme Court noted in *Wolfe*, "where it is the policy of the law to throw its protection around knowledge gained or statements made in confidence, it will find a way to make that protection effective by bringing within its scope the testimony of those whose participation in the confidence is reasonably required."²²³ On the other hand, in the context of the marital communications privilege it is understood, as the *Wolfe* court noted, that husband and wife may communicate confidentially and effectively without the aid of a third party.²²⁴ Thus, while an interpreter's presence during a communication between attorney and client did not destroy the privilege,²²⁵ a letter sent from a husband to his wife was not privileged when the husband knew of his wife's reading difficulties and she sought assistance from a third party to understand the content of the letter.²²⁶

The focus on necessity suggests the marital communications privilege should not apply to spousal communications sent via web-based e-mail. Certainly there are other avenues for spousal communication that do not require the involvement of third parties. While communication by way of e-mail may be necessary for the arms-length relationship between attorney and client or physician and patient, the marital relationship is something other than an arms-length relationship. The marital relationship is characterized by its intimacy, and communication by way of e-mail is at odds with such intimacy.

3. Legislative Solutions

At least three legislative enactments address whether the use of electronic communication should vitiate the evidentiary privileges. The ECPA states that, "[n]o otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character."²²⁷ While it may appear that this statute settles the question of whether e-mails obtained by law enforcement will retain their privileged status, this section of the ECPA specifically applies to "this chapter" and not the SCA, which is found in a different chapter.²²⁸

219. See *supra* notes 194, 201 and accompanying text.

220. See *supra* text accompanying notes 197–98.

221. See *supra* text accompanying note 202.

222. See *supra* notes 199, 205, 208 and accompanying text.

223. *Wolfe v. United States*, 291 U.S. 7, 16 (1934).

224. *Id.* at 16–17.

225. See *supra* text accompanying note 199.

226. *Grulkey v. United States*, 394 F.2d 244, 246 (8th Cir. 1968).

227. 18 U.S.C. § 2517(4) (2000).

228. *Id.*; see David Hricik, *Lawyers Worry Too Much About Transmitting Client Confidences by Internet E-Mail*, 11 GEO. J. LEGAL ETHICS 459, 476 (1998) (stating that "§ 2517(4) does not apply to 'stored communications'").

Additionally, a New York statute states the following: “No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication.”²²⁹ California has enacted a statute with virtually identical language.²³⁰

These three statutes address electronic communications and the evidentiary privileges, but their application is probably too broad. Because of the differences in the nature and origins of the marital communications privilege as compared to the professional privileges, legislative enactments seeking to maintain the integrity of all the evidentiary privileges despite disclosure through web-based e-mail fail to address the issue of whether the marital privilege *should* apply to web-based e-mail. These statutes provide a practical answer to law enforcement officers and the courts, but they do not answer the question of whether communication via web-based e-mail is at odds with the purpose of the marital communications privilege. Indeed, one could argue that if the involvement of a third party is necessary for spouses to communicate with each other, then the marital communications privilege may no longer serve its intended purpose. Thus, Part V addresses abrogation of the marital communications privilege.

V. THE FUTURE OF THE MARITAL COMMUNICATIONS PRIVILEGE

As stated earlier, the purpose of the marital communications privilege is to promote marital harmony and protect marital confidences.²³¹ Many commentators have criticized the marital communications privilege. These commentators have waged a host of arguments, the strongest being that the privilege does not satisfy its stated purpose.²³² In determining the viability of the evidentiary privileges, legal scholars recognize at least two approaches.²³³ Part V applies each approach to the marital communications privilege in order to determine whether the privilege should continue to exist.

229. N.Y. C.P.L.R. 4548 (McKinney Supp. 2006).

230. See CAL. EVID. CODE § 917(b) (West Supp. 2006) (“A communication between persons in a relationship listed in subdivision (a) does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication.”). Subsection (a) lists the relationships that qualify for the privilege under California law, including “lawyer-client, physician-patient, psychotherapist-patient, clergy-penitent, [and] husband-wife.” *Id.* § 917(a).

231. See *supra* note 10 and accompanying text.

232. See *supra* notes 29–39 and accompanying text.

233. See *infra* Parts V.A–B.

A. *The Utilitarian Approach*

Dean Wigmore created the utilitarian, or the “instrumental,” approach in the United States.²³⁴ Wigmore fashioned the approach as a new framework by which courts could analyze new privileges and revisit existing privileges.²³⁵ According to Wigmore’s approach, four conditions are necessary before a court may recognize an evidentiary privilege:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.²³⁶

Under Wigmore’s approach, unless each of the four criteria is satisfied, no privilege can exist.²³⁷ Professor Imwinkelried suggests that Wigmore intentionally created a very rigorous test because he advocated greater limits on the creation of new evidentiary privileges and the review of existing privileges.²³⁸ Many courts have accepted Wigmore’s approach as the framework that should be used to determine whether the creation of a new privilege is warranted.²³⁹ The application of these criteria to the marital communications privilege provides insight on whether the privilege should exist.

The first factor is fairly subjective. It involves a determination of whether the communicating spouse intended to make a confidential disclosure. In most instances, this factor can be established with ease. However, one could argue that if the communicating spouse sends a web-based e-mail to the recipient spouse with

234. EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 3.1, at 119–22 (Richard D. Friedman ed., 2002).

235. *Id.* § 3.2.3, at 130.

236. WIGMORE, *supra* note 27, § 2285, at 527.

237. *Id.*

238. IMWINKELRIED, *supra* note 234, § 3.2.3, at 130.

239. See, e.g., *In re Grand Jury*, 103 F.3d 1140, 1152 (3d Cir. 1997) (quoting WIGMORE, *supra* note 27, § 2285) (using the Wigmore factors to determine if a privilege exists); *Doe v. United States*, 711 F.2d 1187, 1193 (2d Cir. 1983) (citing WIGMORE, *supra* note 27, § 2285) (using the Wigmore factors to determine if a privilege exists); *ACLU of Miss., Inc. v. Finch*, 638 F.2d 1336, 1344 (5th Cir. Unit A Mar. 1981) (citing *Garner v. Wolfinbarger*, 430 F.2d 1093, 1100 (5th Cir. 1970)) (using the Wigmore factors to determine if a privilege exists); *Caesar v. Mountanos*, 542 F.2d 1064, 1068 n.10 (9th Cir. 1976) (quoting WIGMORE, *supra* note 27, § 2285) (noting that privileges have been accepted only if they satisfy Wigmore’s criteria).

the realization that the third party ISP will maintain a copy of the communication, then the communicating spouse probably did not intend that the communication be confidential. On the other hand, even if the communicating spouse knew or should have known that the communication was not confidential, he or she may have possessed a subjective belief that the communication was confidential. Thus, the first factor would be established even if the communicating spouse disclosed confidential information via web-based e-mail.

Wigmore's second factor is much more difficult to establish. The second factor requires the proponent of the privilege to establish that confidentiality is essential to the maintenance of a good relationship between the parties. In other words, the proponent must show that, absent the privilege, a similarly situated person would be deterred from disclosing the confidential information.²⁴⁰

Wigmore created the second factor on a theory that any privilege satisfying this factor would never work to block admissible evidence. In Wigmore's view, if it is established that the communications would not have been made in the absence of the privilege, then elimination of the privilege would likely result in the communicator's decision not to disclose the information. "In short, there is an evidentiary 'wash'—while evidence might be excluded at trial pursuant to a privilege objection, but for the privilege the evidence would not have come into existence."²⁴¹ The Supreme Court agrees with this approach. In *Swidler & Berlin v. United States*,²⁴² a case involving the attorney-client privilege, the Court noted that clients would probably not share confidential information with their attorneys in the absence of the privilege, thereby making "the loss of evidence . . . more apparent than real."²⁴³

Many authors have argued that the marital communications privilege fails Wigmore's second factor because most spouses do not confide in each other based on the existence of the marital communications privilege.²⁴⁴ Rather, spouses confide in each other due to the trust and affection present in the relationship.²⁴⁵ As one commentator notes:

240. *IMWINKELRIED*, *supra* note 234, § 3.2.3, at 132 (citing *WIGMORE*, *supra* note 27, § 2285); see also *Fisher v. United States*, 425 U.S. 391, 403 (1976) (noting that privileges should be used only to protect communications "which might not have been made absent the privilege" (citations omitted)).

241. *IMWINKELRIED*, *supra* note 234, § 3.2.3, at 135 (footnote omitted); see also Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 31, quoted in *IMWINKELRIED*, *supra* note 234, § 3.2.3 at 135 n.96 ("In a perfect [Wigmorean] world, however, the privilege would shield no evidence. Privilege generates the communication that the privilege protects.").

242. 524 U.S. 399 (1998).

243. *Id.* at 408; see also *Jaffee v. Redmond*, 518 U.S. 1, 11–12 (1996) ("If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled Without a privilege, much of the desirable evidence to which litigants such as [plaintiff] seek access—for example, admissions . . . by a party—is unlikely to come into being.").

244. See, e.g., *DePrez*, *supra* note 14, at 137 ("It is also unrealistic to assume that the rules of evidence have any effect on intimate relationships and the confidences which they encompass.").

245. *Id.*

[T]he contingency of courtroom disclosure would almost never (even if the privilege did not exist) be in the minds of the parties in considering how far they should go in their secret conversations. What encourages them to fullest frankness is not the assurance of courtroom privilege, but the trust they place in the loyalty and discretion of each other. . . . In the lives of most people appearance in court as a party or a witness is an exceedingly rare and unusual event, and the anticipation of it is not one of those factors which materially influence in daily life the degree of fullness of marital disclosures.²⁴⁶

Indeed, commentators have noted that no evidence exists to suggest that married lawyers, who are aware of the marital communications privilege, enjoy more marital bliss than uninformed laypersons.²⁴⁷ Apparently, Wigmore agreed with this analysis arguing that no persuasive data showed that the recognition of the privilege was necessary to facilitate communications between spouses.²⁴⁸ Therefore, with regard to Wigmore's second factor of essential confidentiality, "while the danger of injustice from suppression of relevant proof is clear and certain, the probable benefits of the rule of privilege in encouraging marital confidences and wedded harmony [are] . . . marginal."²⁴⁹

Wigmore's third factor requires the advocate of the privilege to show that the relation is one that, in the opinion of the community, should be "sedulously fostered." In order to satisfy this criterion, the advocate of the privilege must show that society places a high degree of value on the relationship that the privilege seeks to protect.²⁵⁰

The Supreme Court has recognized the marital relationship as one worth protecting, finding marriage to be "the foundation of the family and of society, without which there would be neither civilization nor progress."²⁵¹ Indeed, the Court has described the marital relationship as the most important relationship in life.²⁵² The Supreme Court has also recognized society's interest in protecting the privacy of the marital relationship. In *Griswold v. Connecticut*,²⁵³ the Court stated that it found "repulsive" the idea of allowing the government "to search the sacred precincts of marital bedrooms."²⁵⁴ Considering the value that the Court places on

246. MCCORMICK ON EVIDENCE, *supra* note 29, § 86.

247. Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 682 (1929).

248. WIGMORE, *supra* note 27, § 2332.

249. MCCORMICK ON EVIDENCE, *supra* note 29, § 86.

250. *Id.* § 3.2.3, at 134.

251. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

252. *Id.* at 205.

253. 381 U.S. 479 (1965).

254. *Id.* at 485–86. The *Griswold* Court described the concept of privacy in the marital relationship in the following manner:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for

the institution of marriage, it may make sense that confidential communications between spouses should be protected.

Wigmore's final factor requires proof that the injury to the relationship that would result from disclosure of the communication is greater than the benefit gained from disclosure of the communication.²⁵⁵ The analysis of Wigmore's second factor is important in the analysis of the fourth factor.²⁵⁶ If, as the second factor requires, the existence of the privilege is essential to the proper functioning of the relationship that is to be protected, then the relationship would suffer severely from the disclosure of confidential information. If, on the other hand, the privilege has no effect on whether the parties to the relationship engage in confidential communications, then the disclosure of confidential information would not cause an injury to the relationship that is greater than the benefit that the justice system, and society at large would gain from the disclosure of the information.

With regard to the marital privilege, it is very likely that Wigmore's second and fourth factors cannot be established. Wigmore's utilitarian or instrumental approach is based on the idea that the evidentiary privileges should exist only as an instrument or a means to accomplish another goal.²⁵⁷ Specifically, Wigmore felt that evidentiary privileges should be recognized only where they are "a necessary means of promoting a valuable, confidential social relation."²⁵⁸ Because the marital communications privilege is not necessary to the promotion of the marital relationship, the privilege should not exist based on Wigmore's approach.

While Wigmore's utilitarian model is widely accepted by courts, it is not without its critics. Indeed, Wigmore himself questioned whether the utilitarian model would support the case for a spousal privilege.²⁵⁹ However, rather than arguing for abrogation of the marital communications privilege, some have argued that a different model should be applied in hopes of justifying the privilege's existence.

B. *The Humanistic Approach*

The humanistic approach to the evidentiary privileges suggests that privileges should exist, not to affect the communicator's behavior, but to protect certain personal rights such as informational privacy or individual autonomy.²⁶⁰ The Supreme Court has recognized that the constitutional right to privacy may protect

better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486.

255. WIGMORE, *supra* note 27, § 2285.

256. *See supra* notes 240–49 and accompanying text.

257. IMWINKELRIED, *supra* note 234, § 5.1.1, at 257.

258. *Id.*

259. WIGMORE, *supra* note 27, § 2333.

260. IMWINKELRIED, *supra* note 234, § 5.1.2, at 259.

“the individual interest in avoiding [the] disclosure of personal matters,” as well as “the interest in independence in making certain kinds of important decisions.”²⁶¹ The humanistic approach has moral underpinnings. Its promoters argue that certain concepts, namely privacy and autonomy, must be safeguarded despite the effect that the exercise of these rights might have on the admissibility of relevant evidence.²⁶²

1. *The Informational Privacy Rationale*

The first rationale for the humanistic approach to the evidentiary privileges involves the idea of informational privacy. According to Professor Imwinkelried, “the immediate result of denying a privilege is a loss of informational privacy.”²⁶³ Thus, the humanistic approach suggests that the evidentiary privileges exist to protect every person’s right to confide in certain people without fear that the government will compel disclosure of the information.²⁶⁴

Applying the informational privacy rationale to the marital communications privilege, it is clear that the privilege should exist to protect one’s right to confide privately in his or her spouse. In 1973, as an expression of his opposition to Proposed Federal Rule of Evidence 505, which would have abolished the marital communications privilege while codifying the spousal testimonial privilege,²⁶⁵ Professor Charles Black drafted a letter to Congressman William L. Hungate, the chairman of the House Special Subcommittee on Reform of the Federal Criminal

261. *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977). Some argue that the Supreme Court never explicitly recognized a constitutional right to informational privacy. See Edward J. Imwinkelried, *The Historical Cycle in the Law of Evidentiary Privileges: Will Instrumentalism Come into Conflict with the Modern Humanistic Theories?*, 55 ARK. L. REV. 241, 258–59 (2002). Additionally, some lower courts have refused to recognize a constitutional right to informational privacy. See, e.g., *Cutshall v. Sundquist*, 193 F.3d 466, 480 (6th Cir. 1999) (noting that although the *Whalen* Court acknowledged “the possibility of an individual interest in avoiding disclosure of personal matters,” it only cited concurring and dissenting opinions). In contrast, several lower courts have recognized a constitutional right to informational privacy. See *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 580 (3d Cir. 1980) (holding that there is a constitutional right to privacy of medical records kept by an employer, but that the government’s interest in protecting the safety of employees was sufficient to permit their examination); *Plante v. Gonzalez*, 575 F.2d 1119, 1132, 1134 (5th Cir. 1978) (identifying a “right to confidentiality” and holding that balancing is necessary to weigh intrusions); see also *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983) (applying a balancing or intermediate scrutiny test to determine whether financial disclosure laws violated the right to confidentiality); *Haw. Psychiatric Soc’y v. Ariyoshi*, 481 F. Supp. 1028, 1043 (D. Haw. 1979) (holding that disclosure of psychiatric records implicates the constitutional right to confidentiality); *McKenna v. Fargo*, 451 F. Supp. 1355, 1381 (D.N.J. 1978) (“The analysis in *Whalen* . . . compels the conclusion that the defendant . . . must justify the burden imposed on the constitutional right of privacy . . .”).

262. See generally IMWINKELRIED, *supra* note 234, at 257–61 (discussing the general humanistic focus on protecting privacy in various forms).

263. IMWINKELRIED, *supra* note 234, § 5.3.2, at 304.

264. See Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 794–95 (2002). But see IMWINKELRIED, *supra* note 234, § 5.3.2, at 304 (arguing that the recognition of evidentiary privileges should not be tied to the right to informational privacy because the existence of the right “is not settled as a matter of Supreme Court jurisprudence”).

265. See *supra* text accompanying notes 34–39.

Laws.²⁶⁶ In the letter, Professor Black argued that abrogation of the marital communications privilege would result in the violation of each spouse's right to privacy:

[T]he meaning of the Rule (made entirely clear in the Advisory Committee's comments) is that, however intimate, however private, however embarrassing may be a disclosure by one spouse to another, or some fact discovered, within the privacies of marriage, by one spouse about another, that disclosure or fact can be wrung from the spouse under penalty of being held in contempt of court, if it is thought barely relevant to the issues in anybody's lawsuit for breach of a contract to sell a carload of apples. . . . It seems clear to me that this Rule trenches on the area of marital privacy so staunchly defended by the Supreme Court²⁶⁷

The informational privacy approach promotes the idea that everyone has the right to confide in certain persons without fear of disclosure to outsiders. Considering the value that society and the courts place on the marital relationship, it stands to reason that private information shared between spouses should be protected by an evidentiary privilege. Thus, the informational privacy rationale supports the continued existence of the marital communications privilege.

2. *The Individual Autonomy Rationale*

A second rationale for the humanistic approach is the concept of individual autonomy or decisional privacy.²⁶⁸ Under this rationale, the evidentiary privileges should exist to help a person "effectively exercise autonomy by facilitating *intelligent, independent* life preference choices."²⁶⁹ The existence of certain evidentiary privileges will arguably promote autonomy by allowing individuals the ability to freely consult confidants about "fundamental life preference choices" without fear of government intrusion.²⁷⁰ Thus, if a particular evidentiary privilege promotes such free-flowing communication, then the humanistic approach supports its existence. For example, some commentators have argued that the attorney-client privilege promotes individual autonomy in the following manner: "Ready access to legal champions can empower individuals without legal training to assert and defend their rights. Making communications privileged ensures that the dialogue

266. Charles L. Black, Jr., *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 46.

267. *Id.* at 48.

268. IMWINKELRIED, *supra* note 234, § 5.3.3, at 308.

269. *Id.* § 5.3.3(c), at 327.

270. *Id.*

between the attorney and client is frank and encourages individuals to explore their legal options with an advisor.”²⁷¹

In order to determine if a particular privilege will facilitate intelligent, independent choices, the proponents of the individual autonomy rationale have created a three factor test. According to the test, courts must determine the following:

- (1) [W]hether the relation is a consultative one; (2) whether there is a relatively firm societal understanding that the consultant’s duty is to help the other person pursue his or her interests and make a choice; and (3) whether the consultative relationship is centered on choices in an area of the person’s life implicating a fundamental life preference.²⁷²

These three criteria are problematic when applied to the marital communications privilege. The first criterion requires that the relationship be a consultative one. While it is true that a marriage sometimes may be a consultative relationship, it is not inherently consultative as are the relationships between attorney-client, physician-patient, psychotherapist-patient, and clergy-communicant. In order to determine if the spousal relationship satisfies this first criterion, courts would be forced to inquire into the nature of the specific communication at issue in order to determine if the communicating spouse was seeking consultation. Traditionally, courts have been reluctant to delve into the content of a private communication between spouses.²⁷³ Instead, courts prefer an absolute rule that confidential communications between spouses will be considered privileged because this rule provides a measure of security to married couples that “their private communications will be protected and will not be susceptible to exposure by an after-the-fact determination.”²⁷⁴ Therefore, even if the first criterion of the individual autonomy rationale calls for recognition of the marital

271. Richard Lavoie, *Making a List and Checking It Twice: Must Tax Attorneys Divulge Who’s Naughty and Nice?*, 38 U.C. DAVIS L. REV. 141, 147 n.14 (2004), *see also* Steven Goode, *Identity, Fees, and the Attorney-Client Privilege*, 59 GEO. WASH. L. REV. 307, 317 (1991) (“The [attorney-client] privilege enables lawyers to help their clients understand the nature of their legal problems, thereby allowing clients to participate in decisions concerning their legal destiny. By thus fostering self-knowledge and client involvement, the privilege promotes individual autonomy.”).

272. *IMWINKELRIED*, *supra* note 234, § 5.4.3(a), at 411.

273. *See, e.g.*, *Smith v. State*, 344 So. 2d 915, 919 (Fla. Dist. Ct. App. 1977) (holding that a court should not inquire whether a communication between spouses was incident to, rather than because of, the marital relationship), *overruled on other grounds by* *Ruffin v. State*, 397 So. 2d 277, 279 (Fla. 1981). According to the *Smith* court, such an inquiry concerning causation could have a “potential chilling effect” upon confidential spousal communications. *Id.* It is important to note that, in most jurisdictions, the content of a spousal communication can affect whether the privilege will attach if the communication was made in furtherance of a crime where the spouses acted jointly or if one spouse is charged with a crime against the other spouse or the child of the other spouse. *See, e.g.*, ALA. R. EVID. 504(d) (listing the exceptions to the marital privilege rule); FLA. STAT. ANN. § 90.504(3)(b) (West 1999) (same); HAW. R. EVID. 505(c) (2006) (same).

274. *Smith*, 344 So. 2d at 919.

communications privilege, the privilege might not apply depending on the communicating spouse's purpose, thereby making the privilege qualified or conditional rather than absolute.²⁷⁵

The second criterion of the individual autonomy rationale is also problematic when applied to the marital communications privilege. The second criterion requires a firm societal understanding that the consultant's duty is to help the other person pursue his or her interests and make a choice.²⁷⁶ With regard to the professional privileges, this criterion can be established with ease. In the context of each of the professional privileges, society has accepted the idea that the professional in the relationship has a duty to advise and possibly assist the layperson in making a decision. Any contractual relationship between the professional and the layperson regarding payment for services rendered would only buttress the existence of such a duty. The professional relationships are fiduciary in nature in that "confidence is reposed on one side, and domination and influence result on the other."²⁷⁷ In each of the professional relationships, the professional has undertaken a fiduciary duty to act primarily for the benefit of the layperson.²⁷⁸

275. See IMWINKELRIED, *supra* note 234, § 5.4.4(a) at 420 ("[T]he shift to an autonomy-based humanistic rationale should prompt the courts to classify more privileges as qualified."). While some scholars advocate a move from absolute to qualified or conditional privileges, courts are reluctant to classify the marital communications privilege as conditional. See *infra* text accompanying note 293.

276. IMWINKELRIED, *supra* note 234, § 5.4.3(a), at 411.

277. BLACK'S LAW DICTIONARY 432 (6th ed. abridged 1991); accord *Dairy Farmers of Am., Inc. v. Travelers Ins. Co.*, 292 F.3d 567, 572 (8th Cir. 2002) ("[A] 'fiduciary relationship' is deemed to exist when 'a special confidence [is] reposed in one who in equity and good conscience is bound to act in good faith, and with due regard to the interests of the one reposing the confidence.'" (quoting *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746, 751 (Mo. Ct. App. 1990))); *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1163 (10th Cir. 2000) ("A fiduciary relationship exists when one person is under a duty to act for or to give advice for the benefit of another upon matters within the scope of their relationship. A fiduciary relationship can arise when one party occupies a superior position relative to another." (quoting *Johnston v. CIGNA Corp.*, 916 P.2d 643, 646 (Colo. Ct. App. 1996))).

278. See, e.g., *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) (finding the attorney-client relationship to be "inherently fiduciary"); *Gracey v. Eaker*, 837 So. 2d 348, 354 (Fla. 2002) (finding that a fiduciary relationship exists between psychotherapist and patient); *State ex rel. Kitzmiller v. Henning*, 437 S.E.2d 452, 455 (W. Va. 1993) (concluding that a fiduciary relationship exists between physician and patient). With regard to the clergy-communicant relationship, courts are split on whether it is constitutionally sound to hold members of the clergy to a fiduciary duty. Some courts are of the opinion that analyzing the scope of any fiduciary duty owed by a member of the clergy to his or her parishioner would require the court's "excessive entanglement with religion." *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 98 (Mo. Ct. App. 1995) (quoting *Schmidt v. Bishop*, 779 F. Supp. 321, 328 (S.D.N.Y. 1991)). Other courts have allowed breach of fiduciary duty claims by parishioners claiming that members of the clergy engaged in sexually inappropriate behavior during the course of pastoral counseling because the claims arose from conduct that could not be defended on the basis of a sincerely held religious belief or practice. See *Doe v. Evans*, 814 So. 2d 370, 376 (Fla. 2002); *F.G. v. MacDonell*, 696 A.2d 697, 702–03 (N.J. 1997); *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988). In sum, most courts hold that a fiduciary relationship between clergy and communicant may exist depending on the facts of the case. See, e.g., *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213, 1240 (Miss. 2005) (holding that a fiduciary relationship will not exist merely because of a priest's status but that a fiduciary relationship may arise from factual circumstances); *Bohrer v. DeHart*, 943 P.2d 1220, 1225 (Colo. Ct. App. 1996) (stating that a clergy-parishioner relationship "may be fiduciary in

In contrast, many courts have held that the marital relationship is not inherently fiduciary.²⁷⁹ These courts have held that a marriage is not inherently fiduciary because kinship alone is not enough to create the protected relationship.²⁸⁰ Thus, “more than the gratuitous reposal of a secret to another who happens to be a family member is required to establish a fiduciary or similar relationship of trust and confidence.”²⁸¹ Additionally, most fiduciary relationships are based on an imbalance of knowledge and influence between the parties.²⁸² In the context of the attorney-client relationship, for example, the attorney is typically more knowledgeable about the law and, as a consequence, will wield a great amount of influence with the layperson in making certain decisions. In contrast, the modern conceptualization of marriage is based on mutual trust, commitment, and decision-making.²⁸³ While one spouse may be more knowledgeable than the other, such an imbalance is not inherent in the relationship. As a result, it makes sense that no fiduciary duty should exist between spouses unless they have entered into some other transaction that gives rise to the duty. The second criterion of the individual autonomy rationale requires society’s recognition that one party must subordinate his or her own interests to those of the other party. While society may be prepared to make such a recognition with regard to certain professional relationships, the

nature,” depending on the facts of the case) (citing *Moses v. Diocese of Colo.*, 863 P.2d 310, 322 (Colo. 1993)).

279. See, e.g., *Chestman*, 947 F.2d at 568 (“[M]arriage does not, without more, create a fiduciary relationship.”); *In re Estate of Karmey*, 658 N.W.2d 796, 799 (Mich. 2003) (“[M]arriage is not a relationship that has traditionally been recognized as involving fiduciary duties.”). But see *Sidden v. Mailman*, 563 S.E.2d 55, 58 (N.C. Ct. App. 2002) (holding that the marital relationship creates a fiduciary duty where the spouses engage in business transactions because the “marital relationship is the ‘most confidential of all relationships’” (quoting *Eubanks v. Eubanks*, 159 S.E.2d 562, 567 (N.C. 1968))).

280. *Chestman*, 947 F.2d at 568 (quoting *United States v. Reed*, 601 F. Supp. 685, 706 (S.D.N.Y. 1985)).

281. *Id.*

282. See *In re Estate of Karmey*, 658 N.W.2d at 799 n.3 (“Although a broad term, ‘confidential or fiduciary relationship’ has a focused view toward relationships of inequality.”); *Barbara A. v. John G.*, 193 Cal. Rptr. 422, 432 (Cal. Ct. App. 1983) (“The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party.”).

283. For a description of the changing conception of marriage, see Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 9–14 (1990). Scott argues that a change in gender roles has affected society’s conceptualization of marriage:

Ideal wives in traditional marriages were devoted, unselfish caretakers of the home, the family, and the marriage. As the traditional model has eroded, the qualities associated with masculine values of achievement, self-development, and personal fulfillment have become dominant for both spouses. With this change, marriage has become an “exchange” relationship. Husband and wife are equal, autonomous parties, each pursuing emotional fulfillment through marriage.

Id. at 20–21 (footnotes omitted).

same cannot be said for the marital relationship.²⁸⁴ As such, the marital communications privilege is not supported by the second criterion.

Finally, the third criterion of the individual autonomy rationale requires that the protected relationship center on choices related to a fundamental life preference. In other words, the third criterion requires that the parties utilize the privilege to make choices and decisions about areas of one's life that deserve constitutional protection.²⁸⁵ For example, if a penitent consults a priest for assistance in making independent choices about constitutionally protected religious practices, then the clergy-communicant privilege would satisfy this third criterion.

The marital communications privilege does satisfy the third criterion, but once again, the inquiry is content-based, thereby making the privilege qualified rather than absolute.²⁸⁶ The third criterion would be satisfied where one spouse consults the other regarding constitutionally protected choices. In the context of the familial relationship, such constitutionally protected choices include decisions related to "marriage, procreation, contraception, family relationships, and child rearing and education."²⁸⁷ Therefore, if marital communications relate to these constitutionally protected areas, then the individual autonomy rationale suggests that the privilege should protect disclosure of such statements. However, where the communications relate to the commission of a crime, as is the case with many privileged communications between spouses, none of these constitutionally protected areas is implicated. Because the reasoning behind the individual autonomy rationale breaks down depending on the content of the communication, this rationale would create a qualified marital communications privilege and force courts to examine the content of the communication before determining whether the privilege should attach.

Additional problems exist when the individual autonomy rationale is applied to the marital communications privilege. The proponents of this rationale argue that an evidentiary privilege should exist only if it promotes free-flowing communication regarding important life choices. However, as established in an earlier portion of this Article, it is very likely that the marital privilege does little to encourage confidential communications between spouses.²⁸⁸ Thus, abrogation of the rule would probably not affect the free-flowing communication that the individual autonomy rationale seeks to promote. In a sense, the utilitarian approach and the individual autonomy rationale are quite similar. Each rationale posits that an evidentiary privilege should exist only where its abrogation would affect the flow of confidential communication. Because abrogation of the marital communications privilege would probably not affect the flow of confidential

284. It is true that a spouse may decide to subordinate her interests to those of her spouse, but such a decision is not inherent in the relationship. A spouse's decision to consider her interests as well as those of her spouse would fall short of the second criterion, which requires subordination of one party's interests for those of the other party. See *IMWINKELRIED*, *supra* note 234, § 5.4.3(a), at 411.

285. *Id.* § 5.4.3 at 413.

286. See *supra* note 275 and accompanying text.

287. *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (citations omitted).

288. See *supra* Part V.A.

communications between spouses, both the utilitarian approach and individual autonomy rationale call for abolition of the privilege.

The informational privacy rationale is the only approach that supports the existence of the marital communications privilege, and the relationship between informational privacy and the marital communications privilege is quite strong. Rather than stating that the evidentiary privileges should only exist if they will affect the flow of communication between the parties to certain protected relationships, the informational privacy rationale recognizes that it is morally repugnant to require the disclosure of certain private information or to force an otherwise honest and decent person to choose among betraying his or her spouse, lying, or going to jail.²⁸⁹ To be sure, many commentators argue that the informational privacy rationale for the marital communications privilege is a qualified one. It has been argued that the need for privacy in the marital relationship should give way “where there is a need for otherwise unobtainable evidence critical to the ascertainment of significant legal rights.”²⁹⁰ While this rationale would not cause courts to review the content of the confidential communication, it would force courts to consider whether the privilege should attach to the communication in light of one party’s need for the evidence. In other contexts, lower courts recognizing a right to informational privacy have required disclosure of the private information where the government’s interest is sufficiently compelling.²⁹¹

Because courts have exclusively relied upon the utilitarian approach to justify the evidentiary privileges, it is very unlikely that they would employ either of the humanistic rationales.²⁹² Even if courts decide to rely upon the informational privacy rationale as a justification for the marital communications privilege, it is very unlikely that a change in the absolute nature of the privilege would follow. As the Supreme Court has stated, “[A]n uncertain privilege . . . is little better than no privilege at all.”²⁹³

At the very least, the recognition of the marital communications privilege is justified under the informational privacy rationale, and, for the time being, the privilege will remain absolute in nature. This Article concludes with a look at whether the use of web-based e-mail supports the informational privacy rationale behind the marital communications privilege.

289. See Black, *supra* note 266, at 48.

290. MCCORMICK ON EVIDENCE, *supra* note 29, § 86.

291. See *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir.1983) (allowing public inspection of state employees’ financial disclosure statements); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 580 (3d Cir. 1980) (allowing disclosure of employees’ medical records maintained by employer); *Plante v. Gonzales*, 575 F.2d 1119, 1136 (5th Cir. 1978) (allowing disclosure of government officials’ private financial information); *McKenna v. Fargo*, 451 F. Supp. 1355, 1381 (D.N.J. 1978) (allowing limited disclosure of firefighter applicants’ psychological examination results).

292. See Goode, *supra* note 271, at 316 n.63 (noting that judicial reliance on theories other than the utilitarian approach is “as rare as the proverbial hen’s tooth”).

293. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

VI. CONCLUSION

As stated earlier, the informational privacy rationale posits that marital communications should be protected because it is morally distasteful to force one spouse to betray the other.²⁹⁴ This rationale supports the proposition that the confidential nature of the marital relationship should not be violated by the government's search for evidence. The informational privacy rationale recognizes the marital relationship as an intrinsically private one and protects private marital communications, not to encourage greater communication between spouses, but because it is the right thing to do.

The informational privacy rationale does not support the view that communications sent via web-based e-mail should be protected by the marital communications privilege. The informational privacy rationale seeks to prevent the government from forcing one spouse to turn on the other or face a contempt charge. If, however, a third party discloses the communication and testifies regarding its content, then no betrayal between the spouses would result. Additionally, forcing an ISP to disclose the content of the communication would not violate the confidential nature of the marital relationship because the communicating spouse chose to sacrifice the confidentiality of the communication by sending it over the Internet and storing it on the server of a third party. The outcome would be no different if the communicating spouse chose to send a postcard to his spouse via a messenger and the communicating spouse had contractually agreed to allow the messenger access to the content of the postcard. If the messenger exercised his legal right to review the content of the postcard, there would be no violation of the informational privacy rights of the spouses. Finally, protecting from disclosure communication sent via web-based e-mail may not be the right thing to do. The marital relationship is unique in that only two people are required for it to function properly. The professional relationships will sometimes call for the necessary involvement of third parties in order for effective communication to occur, but the marital relationship has no such requirement. Spouses have various means of communication that do not require the involvement of a third party who is a stranger to the relationship. If a communicating spouse either inadvertently or intentionally decides to involve a third party in otherwise confidential communications with his or her spouse, then it is not morally abhorrent to require the third party to disclose the content of the communication.

While this conclusion may be troublesome to some readers, it is no different from concluding that one should not confidentially communicate with his or her spouse via a bullhorn, an office intercom, a recorded prison telephone line, or an Internet chat room. In any of these instances, Big Brother may be listening, and, if he is, he should be allowed to disclose the content of the conversation.

294. *See supra* Part V.B.1.