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Pillow Talk, Grimgribbers and Connubial Bliss:
The Marital Communication Privilege

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Pillow Talk, Grimgribbers and Connubial Bliss: 
The Marital Communication Privilege

The rule that all relevant evidence is admissible at trial is a “presupposition involved in the very conception of a rational system of evidence.”¹ Such a rule allows all relevant facts to be presented to the factfinder in litigation—a prerequisite for the effective search for truth in an adversary system of justice.² Without such full disclosure “[t]he very integrity of the judicial system and public confidence in the system” would be impaired.³ Consequently, “the public . . . has a right to every man’s evidence.”⁴

The rules of evidence which regulate the admission of facts may be divided into two categories: rules of exclusion and rules of privilege.⁵ Rules of exclusion serve one of several functions. Some prevent the introduction of irrelevant facts which would do little to facilitate the fact-finding process. Others exclude relevant facts whose potential for prejudicing the factfinder is found to outweigh their relevance. Still other exclusionary rules prevent the introduction of unreliable evidence.⁶

While the exclusionary rules are designed to facilitate the truth

¹ J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264-65 (1898) (speaking of the need to exclude all irrelevant evidence); accord, In re Richardson, 31 N.J. 391, 401, 157 A.2d 685, 701 (1960); Morgan, Some Observations Concerning a Model Code of Evidence, 89 U. PA. L. REV. 145 (1940); cf. FED. R. EVID. 402 (all relevant evidence to be admitted unless otherwise provided).
⁴ 12 COBETTS PARLIAMENTARY HISTORY 693 (1742) (Hardwicke, L.C.), quoted in 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192, at 71 (rev. ed. J. McNaughton 1961). Although this expression is often attributed to Wigmore, see, e.g., Comment, The Child-Parent Privilege: A Proposal, 47 FORDHAM L. REV. 771, 771 n.3 (1979) (citing 8 J. WIGMORE, supra, § 2192, at 70), the expression was originated by Lord Chancellor Hardwicke in the eighteenth century, see Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961).
⁶ Barnhart, supra note 5, at 377; Morgan, supra note 1, at 154; see, e.g., FED. R. EVID. 402 (irrelevant evidence inadmissible).
⁷ See, e.g., FED. R. EVID. 403 (relevant evidence to be excluded if its probative effect is less than its prejudicial impact).
⁸ C. MCCORMICK, supra note 5, § 72; Barnhart, supra note 5, at 377; see, e.g., FED. R. EVID. 701 (limiting the type of opinion testimony allowed to be given by a lay witness); id. 802 (hearsay generally inadmissible).
gathering process, the rules of privilege frustrate it. The function of privileges is to foster or safeguard certain relationships or interests which are considered so important that their protection justifies the exclusion of facts from evidence which are both reliable and relevant.

One of the most prevalent of such rules is the marital privilege; all American jurisdictions have some form of privilege or disqualification restricting the admissibility of spousal testimony. The most common, and least criticized, of these is the marital communication privilege.

Privileges may serve to protect or foster a relationship in several ways. Privileges may be used to both safeguard the privacy of the relationship immediately involved in the litigation, Arnold v. State, 353 So. 2d 524, 526 ( Ala. 1977); Krattenmaker, supra, at 85-94; Comment, supra note 4, at 772; and foster the relationship by encouraging communication within it, People v. Shapiro, 257 Cal. App. 2d 108, 109 (1968); Fisher, supra note 5, § 72; Barnhart, supra note 5, at 377; McCormick, supra note 5, at 447; Comment, From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?, 1978 B.Y.U. L. Rev. 1002, 1004; Note, Testimonial Privilege and Competency in Indiana, 27 IND. L.J. 256, 256-57 (1951).


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This note will discuss the marital communication privilege as it is applied in most jurisdictions, and will demonstrate that the privilege is more of a hindrance to the efficient administration of justice than an effective device safeguarding the institution of marriage. The possibility that the constitutional right of privacy mandates limited protection for certain marital communications will then be considered. Finally, a new and narrower marital communication privilege will be outlined which comports with constitutional guarantees of privacy while allowing the admission of most relevant evidence.

THE MARITAL COMMUNICATION PRIVILEGE

Precursors of the Privilege

The first evidentiary rule governing spousal testimony at common law was the disqualification of parties' spouses as witnesses either for or against the litigant spouse. This spousal incompetency was the product of both the common law disqualification of parties from testifying in their own causes and the concept that husband and wife were one; Privileges and Incompetencies of Husband and Wife, 4 Ark. L. Rev. 426, 432 (1950) (describing the marital communication privilege as sound while suggesting that the anti-marital fact privilege and the incompetency be abolished). But see Proposed Federal Rule of Evidence 505, 56 F.R.D. 244 (1972) (proposing only a privilege for anti-marital facts in criminal cases while disposing of the marital communication privilege in its entirety). The origins of the marital privileges are obscure, thus raising questions as to whether the marital incompetency preceded the privilege for anti-marital facts. Wigmore contended that the latter was first, having been recognized in Bent v. Allot, 21 Eng. Rep. 50 (1579), while the incompetency was first mentioned by Lord Coke in 1 E. COKE, THE FIRST OF THE INSTITUTES OF THE LAWS OF ENGLAND 6b (London 1628). See, e.g., 1 E. MORGAN, BASIC PROBLEMS OF EVIDENCE 43 (1954). Whichever rule restricting spousal testimony actually developed first, most commentators address incompetency first for ease of discussion. See, e.g., Orfield, supra note 14, at 144; Comment, supra note 13, at 298-99.

A second rule of marital incompetency was the so-called "Lord Mansfield's Rule" which prohibited a parent from testifying to nonaccess if the testimony would tend to bastardize a child born in wedlock. See generally C. MCCORMICK, supra note 5, § 67; 7 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 2063-2064 (3d ed. 1940).
because of the unity of spouses, the wife shared her husband’s disqualification as an interested party. Spousal incompetency has, however, been either abolished or limited by judicial decision in most jurisdictions.

The second rule restricting spousal testimony was the privilege allowing a litigant to prevent his spouse from testifying against him. This

\[\text{19} \quad \text{See note 19 supra.}\]

In later years, however, the spousal incompetency was justified by a more modern argument that it prevented the dissension that would arise if a wife were to testify against her husband. Spousal incompetency was, however, either abolished or limited by judicial decision in most jurisdictions.

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\[\text{21} \quad \text{See note 19 supra.}\]
privilege for anti-marital facts was considered effective in preventing dissenion between the litigant and his spouse. In addition to preserving the harmony of marriages, the privilege for anti-marital facts was a means to prevent what was thought to be the naturally repugnant spectacle of a wife compelled to testify against her husband. Although this privilege has been widely criticized, it is still extant in many American jurisdictions.


The expression “privilege for anti-marital facts” was coined by Dean Wigmore, see 8 J. WIGMORE, supra note 4, § 2227, to emphasize that the privilege only affects adverse testimony. Reutlinger, supra note 11, at 1983 n.35. Nevertheless, at least one state provides a testimonial privilege protecting both testimony for and against the other spouse. See ALA. CODE ANN. § 12-21-227 (1975) (giving the witness spouse a privilege not to testify for or against the party spouse). But see 2 J. WIGMORE, supra note 12, § 60D.

United States v. Trammel, 445 U.S. 40, 44 (1980); Hawkins v. United States, 358 U.S. 74, 77 (1958); 8 J. WIGMORE, supra note 4, § 2228; Hutchins & Slesinger, Some Observations on the Law of Evidence: Family Relations, 13 MINN. L. REV. 675, 677 (1929); Reutlinger, supra note 11, at 1359-60; Rothstein, supra note 23, at 132. This rationale has also been used to support the spousal disqualification. See note 19 supra.

Hawkins v. United States, 358 U.S. 74, 77-79 (1958); 8 J. WIGMORE, supra note 4, § 2228; Reutlinger, supra note 11, at 1360; Note, supra note 13, at 210. Although the commentators often speak of the repugnance felt in witnessing a spouse compelled to give testimony, see, e.g., Reutlinger, supra note 11, at 1360, the witness spouse is often prevented from testifying even when she is willing to do so, see, e.g., United States v. Trammel, 445 U.S. 40, 46 (1980); Hawkins v. United States, 358 U.S. 74, 75-76 (1958). This would tend to support the giving of the privilege to the witness spouse; if the witness spouse is willing to testify, surely society should not find it as repugnant a spectacle. Reutlinger, supra note 11, at 1385; Rothstein, supra note 23, at 132.

It has also been suggested that the privilege served to protect the factfinder from the perjured testimony that would be likely if a wife were compelled to testify against her husband. See Note, supra note 13, at 210; cf. Louisell, supra note 11, at 108-10 (noting that this is the primary reasoning behind the European marital privileges).

Jeremy Bentham contended that the reasons given in support of the privilege for anti-marital facts were all counterfeit:

The reason now given, was not, I suspect the original one. Drawn from the principle of utility, though from the principle of utility imperfectly applied, it savours of a late and polished age. The reason that presents itself as more likely to have been the original one, is the grimgribber, nonsensical reason,—that of the identity of two persons thus connected. Baron and Feme are one person in law. On questions relative to the two matrimonial conditions, this quibble is the fountain of all reasoning.

5 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 344-45 (1827); accord, C. MCCORMICK, supra note 5, § 66 (referring to the instant privilege as "an archaic survival of a mystical religious dogma").

Reutlinger, supra note 11, at 1381-82; see, e.g., Trammel v. United States, 445 U.S. 40 (1980); 8 J. WIGMORE, supra note 4, § 2228(4); Note, supra note 13, at 230. Much of the criticism has been directed at the fact that the privilege is not given to the witness spouse. See, e.g., Reutlinger, supra note 11, at 1385.

Note, supra note 13, at 210; Comment, supra note 12, at 107. For a list of statutes codifying the anti-marital fact privilege, see 2 J. WIGMORE, supra note 12, § 488.
Aspects of the Marital Communication Privilege

The marital communication privilege first received statutory recognition in mid-nineteenth century England. At this time there was widespread criticism of the spousal incompetency and the privilege for anti-marital facts rules which ultimately resulted in their abolition in that country. Criticism of both rules focused on their rationales, and continued to build as a result of the increasing independence of women. Although both legislatures and courts recognized the need to relax the restrictions on spousal testimony, they were reluctant to require a spouse to testify to information acquired independently of the marriage as well as to that information known only as a result of the marital relationship. With the attorney-client privilege available as a paradigm, a communication privilege was fashioned which allowed an individual to prevent his spouse from testifying concerning marital confidences, but which did not allow the individual to prevent his spouse from testifying with regard to information acquired outside of the marriage.

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29 8 J. Wigmore, supra note 4, § 2333. The privilege was adopted by American jurisdictions soon after that time. Id. In some American jurisdictions there was no need for statutory enactment because the courts held that the marital communication privilege had been present at common law. See, e.g., Hopkins v. Grimshaw, 165 U.S. 342 (1897); Arnold v. State, 353 So. 2d 524, 526 (Ala. 1977); Duonnolo v. State, 397 A.2d 126 (Del. 1978). The English courts, however, have held that the privilege is a purely statutory creation. See, e.g., Shenton v. Tyler, [1939] 1 Ch. 620; cf. Stapleton v. Crofts, 118 Eng. Rep. 137, 140 (Q.B. 1852) (holding that the rule giving protection to “conjugal confidence” as not yet established in the common law).

30 See, e.g., 8 J. Wigmore, supra note 4, § 2228:
In an age which has so far rationalized, depolarized, and de-chivalrized the marital relation and the spirit of Femininity as to be willing to enact complete legal political equality and independence of man and woman, this marital privilege is the merest anachronism, in legal theory, and an indefensible obstruction to truth, in practice.


31 See Note, supra note 13, at 218; see Comment, supra note 19, at 312.

32 See Note, supra note 13, at 218.

33 C. McCormick, supra note 5, § 78. Most American jurisdictions have a marital communication privilege. See Comment, supra note 19, at 311 & n.28. For a list of statutes codifying the privilege, see 2 J. Wigmore, supra note 12, § 488.

The original English statute gave the privilege to the witness spouse: “No Husband shall be compellable to disclose any Communication made to him by his Wife during the Marriage and no Wife shall be compellable to disclose any Communication made to her by her Husband during the Marriage.” 16 & 17 Vict. c. 83 § 3 (1853). See generally notes 59-61 & accompanying text infra.

The marital communication privilege is both narrower and broader than the privilege for anti-marital facts. Unlike the latter privilege, the marital communication privilege does not
The justification most frequently advanced for the marital communication privilege is that it promotes marital confidences which in turn foster stable marriages. This guarantee of secrecy for marital confidences, it is argued, benefits marriages sufficiently to outweigh the damage to the judicial process caused by the exclusion of evidence. A second rationale, also used to support the privilege for anti-marital facts, is that society finds it naturally repugnant to observe a wife being forced to reveal her husband's marital confidences on the witness stand.

Although most statutes setting forth the marital communication privilege refer to "communications" as being protected, few actually define the term. As a result, the courts have had difficulty determining bar merely testimony adverse to the litigant spouse. 8 J. WIGMORE, supra note 4, § 2333. But see Wis. Code § 905.05(1) (1978) (preventing only testimony concerning marital communications which is to be used against the defendant spouse). The marital communication privilege may be used to exclude testimony even though the holder spouse is not a litigant and would not be adversely affected by the testimony. See note 64 & accompanying text infra. The privilege for anti-marital facts is broader than the marital communication privilege in that it prevents information adverse to the litigant spouse, regardless of the source of the information, while the communication privilege protects only information received from the other spouse due to the marital relationship. Id. For a discussion of exactly what type of information is protected, see text accompanying notes 41-47 infra.

It should be emphasized that, unlike the privilege for anti-marital facts, the instant privilege does not focus on the marriage of the parties involved in the litigation. Instead, the marital communication privilege is intended to foster communication in marriages generally; its protection of the immediate couple's privacy is merely incidental to its broader purpose. Comment, supra note 4, at 777-78.

Reutlinger, supra note 11, at 1360. But see 8 J. WIGMORE, supra note 4, § 2332 (questioning whether the benefit to marriages actually does outweigh the injury to society by the incorrect disposal of litigation); Rothstein, supra note 23, at 131 (while the privilege may not actually promote marital confidences, other policy justifications exist for its retention); notes 104-21 & accompanying text infra.

See note 26 & accompanying text supra.

C. MCCORMICK, supra note 5, § 86; Rothstein, supra note 23, at 131; Note, supra note 13, at 218-19. This rationale was first asserted for the communication privilege by the English Common Law Commission in 1853: "[T]he alarm and unhappiness occasioned to society by . . . compelling the public disclosures of confidential communications between husband and wife would be a far greater evil than the disadvantage which may occasionally arise from the loss of light which such revelations might throw on questions in dispute." COMMON LAW COMMISSION, SECOND REPORT 13 (1853), quoted in 8 J. WIGMORE, supra note 4, § 2332. But see notes 122-26 & accompanying text infra.

C. MCCORMICK, supra note 5, § 78; see, e.g., CAL. EVID. CODE § 980 (1966); IND. CODE § 34-1-14-5 (1978); MINN. STAT. ANN. § 595.02(1) (Supp. 1980).

C. MCCORMICK, supra note 5, § 78; see, e.g., CAL. EVID. CODE § 980 (1966); IND. CODE § 34-1-14-5 (1978); MINN. STAT. ANN. § 595.02(1) (Supp. 1980); S.C. CODE § 19-11-30 (1976).
what constitutes a “communication” and the holdings on the issue have been confused. Most commentators, however, agree that the policy of encouraging confidences between spouses demands only that the privilege apply to expressions or acts that were intended to convey information or to serve as substitutes for words. Despite such agreement, many courts have extended the scope of the privilege to encompass noncommunicative acts done in the presence of a spouse. Many courts have achieved a similar result by holding that the privilege protects all information acquired as a result of the marital relationship.

A similar expansion has occurred in the determination of whether a communication was intended to remain confidential. Although most statutes expressly require confidentiality, the courts have raised a presumption that all communications between spouses satisfy that element. This presumption may be rebutted by a showing that the subject matter of the communication or the circumstances of the communication is such that it was not intended to be confidential.

4 E. MORGAN, supra note 15, at 92-93 (commenting that some of the decisions “shock common sense”); 8 J. WIGMORE, supra note 4, § 2337.

4 State v. Smith, 384 A.2d 687, 690 (Me. 1978); C. MCCORMICK, supra note 5, § 79; 1 E. MORGAN, supra note 15, at 92-93; 8 J. WIGMORE, supra note 4, § 2337.

4 C. MCCORMICK, supra note 5, § 79; 8 J. WIGMORE, supra note 4, § 2337; accord, Pereira v. United States, 347 U.S. 1, 6-7 (1954); State v. Smith, 384 A.2d 687, 690 (Me. 1978); Grundstrom v. State, 456 S.W.2d 92, 93 (Tex. Crim. App. 1970).


4 Note, supra note 14, at 222; see, e.g., Shepherd v. State, 257 Ind. 229, 277 N.E.2d 165 (1971) (participation in crime of burglary with wife driving getaway car was matter of confidence and thus privileged); Prudential Ins. Co. v. Pierce’s Adm’x, 270 Ky. 216, 219, 109 S.W.2d 616, 617 (1937) (communications included all knowledge acquired as a result of the marriage; fact that wife saw the date of her husband’s birth in the family Bible was privileged).

4 This construction often prevents testimony concerning a spouse’s mental or physical condition as observed by the witness spouse. See, e.g., McFadden v. Welch, 177 Miss. 451, 170 So. 903 (1936) (mental state). Contra, Polson v. State, 137 Ind. 519, 35 N.E. 907 (1893) (venereal disease).

4 C. MCCORMICK, supra note 5, § 80; see, e.g., CAL. EVID. CODE § 980 (West 1966); N.Y. CIV. PRAC. LAW § 4502(b) (McKinney 1963).

4 C. MCCORMICK, supra note 5, § 80; Note, supra note 13, at 222-23; see, e.g., Foss v. State, 92 Nev. 163, 167, 547 P.2d 688, 691 (1976).

4 C. MCCORMICK, supra note 5, § 80; Note, supra note 13, at 223; see, e.g., Blau v. United States, 340 U.S. 332 (1951); Smith v. State, 384 A.2d 687 (Me. 1979).

4 The presumption of confidentiality does not apply to interspousal communications concerning business matters. State v. Curtis, 334 S.W.2d 757, 763 (Mo. Ct. App. 1960); C. MCCORMICK, supra note 5, § 80. It has been argued that business matters are intended to become publicly known at a later time and, therefore, it would be unfair for such communications to be excluded at trial. See id. It also has been argued that the disclosure of business matters is not damaging to a marriage. See Sexton v. Sexton, 129 Iowa 487, 491-92, 105 N.W. 314, 316 (1905) (public policy demands their revelation). Some courts appear to feel that business communications to one’s spouse are not included in the definition of “marital communications” at all. See, e.g., Brooks v. Brooks, 357 Mo. 343, 350, 208 S.W.2d 279, 283 (1948) (“[t]he conversations . . . relate primarily to business matters, not marital confidences. . . .”)
cumstances surrounding it\textsuperscript{51} indicate that the communication was not intended to remain confidential. The justification for this presumption is that spouses typically exchange confidences casually, with few express requests for secrecy.\textsuperscript{52} As a result, it is argued, intention would be difficult to establish and thus a presumption is necessary.\textsuperscript{53}

\textsuperscript{51} The presence of third persons at the time of the communication will rebut the presumption of confidentiality. If the communicating spouse was aware of the third party, the privilege fails entirely. In that event, both the witness spouse and the third person will be allowed to testify. Pereira v. United States, 347 U.S. 1 (1954); Keyes v. State, 122 Ind. 527, 23 N.E. 1097 (1889); C. McCormick, supra note 5, § 80; 8 J. Wigmore, supra note 4, § 2339. Contra, State v. Sabin, 79 Wis. 2d 302, 255 N.W.2d 320 (1977). Nevertheless, if the third person is a child of one of the spouses and is too young to understand the meaning of the communication, the privilege will not fail. C. McCormick, supra note 5, § 80; see, e.g., Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967) (presence of an eight year old child does not destroy the privilege). But see Fuller v. Fuller, 100 W. Va. 309, 130 S.E. 270 (1925) (presence of a 13 year old child causes the privilege to fail).

In addition, eavesdroppers are allowed to testify concerning confidences which were overheard. United States v. Kahn, 471 F.2d 191 (7th Cir. 1972), cert. denied, 411 U.S. 986 (1973) (petition on privilege issue), rev'd on other grounds, 415 U.S. 143 (1974); C. McCormick, supra note 5, § 82; Note, supra note 13, at 224. This spectacle of an eavesdropper testifying concerning marital confidences would appear to be just as repugnant to society to witness as the spectacle of a wife testifying voluntarily. \textit{Id. See generally} notes 38-39 & accompanying text supra. Supporters justify the exception by arguing that, as in the attorney-client privilege, the burden of ensuring privacy should be placed on the communicating spouse. C. McCormick, supra note 5, § 82; accord, Commonwealth v. Everson, 123 Ky. 330, 96 S.W. 460 (1907). Another justification is that the statutes often refer to only spousal testimony as being privileged. C. McCormick, supra note 5, § 82; see, e.g., IND. CODE § 34-1-14-5 (1978). Another possible argument is that, if the communicating spouse took no precautions to ensure the inviolability of his confidences, he indicated his indifference to disclosure and, thus, a lack of intent that the communication remain confidential. Nevertheless, with the recent advances in electronic surveillance technology it might be argued that, if the spouse took all reasonable precautions, the testimony of the eavesdropper should not be admitted. C. McCormick, supra note 5, § 82. Contra, United States v. Kahn, 471 F.2d 191 (7th Cir. 1972), cert. denied, 411 U.S. 986 (1973) (petition on privilege issue), rev'd on other grounds, 415 U.S. 143 (1974) (wiretap recording of confidences admissible if the wiretap has been properly authorized).

Finally, "constructive presence," when another person outside the marriage is also made privy to the information conveyed between spouses, may be used to defeat the privilege. Smith v. State, 384 A.2d 687, 692-93 (Me. 1978). Contra, Hipes v. United States, 603 F.2d 786, 788 n.1 (1979). Extrajudicial disclosure would certainly tend to indicate that the requisite confidentiality of the communication did not exist. Nevertheless, one court has indicated in dictum that a wife could not testify concerning her husband's employment, even though such information was available to others outside the marriage. See \textit{id. at} 788 n.1.

\textsuperscript{52} Smith v. State, 384 A.2d 687, 691 (Me. 1978); 8 J. Wigmore, supra note 4, § 2336; Comment, supra note 12, at 111 n.30.

\textsuperscript{53} Smith v. State, 384 A.2d 687, 691 (Me. 1978); 8 J. Wigmore, supra note 4, § 2336. \textit{But see} notes 55-57 & accompanying text infra.

In Smith v. State, 384 A.2d 687 (Me. 1978), the Maine Supreme Court discussed the need for confidentiality between the spouses to be an "actual inducing factor" of the communication or conduct, before such communication or conduct may be privileged:

Hence, if confidentiality confined to husband and wife has not been purposefully and expressly sought or invoked, it must appear, as a minimally necessary condition, that the spouse whose conduct or statement is sought to be protected by claim of privilege must have acted in reliance upon an expec-
Although the privilege has been expanded through determinations of what constitutes a confidential communication, it has also been restricted by the courts' liberal interpretations of the rights of waiver. While the statutes often provide for waiver only by express consent, courts have held that failure to raise the privilege in a timely manner, voluntary courtroom revelation of a material part of the communication and extrajudicial disclosure of privileged matters constitute waivers of the privilege.

Of course, only one who holds the privilege may waive it. In accordance with the policy of encouraging marital communications, the privilege is often given to the communicating spouse. Some jurisdictions, however, have ignored the policy and granted the privilege to the communicatee or to both spouses. Whoever holds the privilege, it may

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Id. at 699 (emphasis omitted) (citing State v. Benner, 284 A.2d 91, 109 (Me. 1971)). Despite such statements, the court nevertheless held that to force the holder of the privilege to establish the intention that the communication remain confidential would be too heavy a burden and would most likely result in the revelation of the confidences sought to be privileged. Therefore, the court ruled that all marital communications were presumed to be confidential. Id. at 691.

See, e.g., CAL. EVID. CODE §§ 912, 980 (West 1966); MICH. COMP. LAWS ANN. § 600.2162 (1968); WIS. STAT. ANN. § 905.05 (West 1975).

See, e.g., People v. Kroeger, 61 Cal. 2d 236, 390 P.2d 369, 37 Cal. Rptr. 593 (1964); Richard v. State, 262 Ind. 534, 536, 319 N.E.2d 118, 120 (1974); Pendleton v. Pendleton, 103 Ohio App. 345, 145 N.E.2d 485 (1957). It has also been held that consent by the holder to the interrogation of his spouse by investigators before trial constitutes waiver. Hunt v. State, 235 Ind. 276, 133 N.E.2d 48 (1956) (suspect told officer to "go ask my wife").

See, e.g., Driver v. Driver, 52 N.E. 401 (Ind. 1898); White v. State, 268 P.2d 310 (Okla. Crim. App. 1954). In Fraser v. United States, 145 F.2d 139 (6th Cir. 1944), cert. denied, 324 U.S. 849 (1945), a party to litigation asserted the privilege but it was erroneously denied by the trial court. After having been ordered by the court to testify, the party testified in order to avoid contempt proceedings. The court of appeals held that he should have continued to refuse to testify and subjected himself to contempt proceedings. Any testimony, the court reasoned, even if under court order, waived the privilege. 145 F.2d at 144.

See, e.g., Wolfe v. United States, 291 U.S. 7 (1934); People v. Worthington, 38 Cal. App. 3d 359, 113 Cal. Rptr. 322 (1974); Richard v. State, 262 Ind. 534, 536, 319 N.E.2d 118, 120 (1974). Courts sometimes refer to this as "constructive presence" and thus use it to rebut the presumption of confidentiality, rather than describing it as a waiver of the privilege. See note 51 supra.

See 8 J. WIGMORE, supra note 4, § 2340(2).

See, e.g., Fraser v. United States, 145 F.2d 139 (6th Cir. 1944), cert. denied, 324 U.S. 849 (1945); Dalton v. People, 68 Colo. 44, 189 P. 37 (1920); N.Y. CIV. PRAC. LAW § 4502(b) (McKinney 1963).

See, e.g., N.M. R. EVID. 505(c) (1980). This is consistent with the original formulation of the privilege in England. See note 35 supra.


Some states do not determine the holder by reference to his role at the time of the communication; rather, the holder is designated in terms of his role in the litigation. See, e.g., Worthington v. State, --- Ind. App. ---, 391 N.E.2d 1164 (1979) (the privilege belongs to
be invoked regardless of whether the holder spouse is a party to the litigation. In addition, the privilege may not be effectively asserted by someone other than the holder spouse, although courts have invoked it to protect a holder who is not present at the hearing.

Although jurisdictions disagree on who should hold the marital communication privilege, all require that a confidence be made during a valid marriage before the privilege will apply. Nevertheless, once a communication has been made during a valid marriage, it will remain privileged despite the subsequent termination of the marriage by divorce or by the death of one of the spouses. This survival of the privilege is premised on the assumption that confidences will not be sufficiently encouraged unless the spouses are assured that their statements will never be subjected to forced disclosure.

the defendant in a criminal trial; Hagedorn v. Hagedorn, 211 N.C. 175, 189 N.E. 507 (1937) (the marital communication privilege belongs to the witness spouse); UTAH CODE ANN. § 77-1-6(2)(d) (Supp. 1980) (a witness cannot be compelled to testify against spouse in a criminal case).

To define the holder as, for example, a defendant in a criminal case would appear to deny a spouse the privilege in any other type of litigation. Unless courts decide that when the statute is inapplicable, i.e., when it is a civil case, the common law rules of the privilege apply, the effect of the privilege in encouraging marital communications is severely restricted.

8 J. WIGMORE, supra note 4, § 2340 n.2; Note, supra note 13, at 219-20.

People v. State, 71 Cal. 2d 430, 78 Cal. Rptr. 655, 455 P.2d 759 (1969) (although defendant had married the witness, because the marriage was illegal and void, the privilege did not attach; Lane v. State, 266 Ind. 438, 364 N.E.2d 756 (1977) (couple which had lived together for six years and which considered themselves to be married were not protected by the marital communication privilege). Statements made before a marriage, or after a divorce, do not come within the scope of the privilege. Volianitis v. Immigration & Naturalization Serv., 352 F.2d 766 (8th Cir. 1965) (only statement made during a marriage protected by the privilege); Damrell v. State, 170 Ind. App. 256, 352 N.E.2d 855 (1976) (statements made after a divorce not protected by the privilege).


The happiness of the married state requires that there should be the most unlimited confidence between husband and wife; and this confidence the law secures by providing that it shall be kept forever inviolable; that nothing shall be extracted from the bosom of the wife which was confided there by the husband.
Although the privilege has no time limitations, certain classes of litigation have been excluded from its purview. The most common exception is the prosecution of one spouse for crimes against the other. This "necessity" exception has been expanded to include litigation concerning crimes by one spouse against the child of either. Other exceptions include actions for alienation of affection or criminal conversation, civil actions by one spouse against the other and situations in which the evidence is necessary to the criminal defense of one of the spouses.

FROM A DEN OF THIEVES BACK TO A CASTLE

In recent years there has been a tendency for codes of evidence to
become more inclusory. This development has been complemented by a trend in the courts to admit more information into evidence. The increasing criticism of exclusionary rules was reflected in United States v. Nixon: "Whatever their origin, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." Notwithstanding this trend, however, the marital communication privilege has emerged relatively unscathed from recent attempts to limit its obstructive impact on litigation. Efforts to create more exceptions to the privilege have been resisted by both courts and legislatures. In addition, the courts have been unwilling, or unable, to restrict the privilege's perimeters to the minimum necessary to advance its underlying policy of encouraging marital confidences.

This general disinclination to limit the purview of the privilege is apparent in court decisions concerning the issue of a communication's confidentiality. The presumption that all marital communications are intended to be confidential results in the exclusion of statements which were made without concern as to whether they were to be revealed elsewhere. With no desire for secrecy to be satisfied, the privilege cannot be said to encourage such communications; it is only those communications which spouses wish to remain confidential which can be to take in the part of criminality.... [L]et us secure to every man in the bosom of his family, and in his own bosom, a safe accomplice; let us make every man's house his castle; and convert that castle into a den of thieves.

5 J. BENTHAM, supra note 26, at 331.

7 Comment, supra note 13, at 110; see, e.g., Proposed Federal Rules of Evidence, 56 F.R.D. 244 (1972); Model Code of Evidence; Uniform Rules of Evidence; C. McCormick, supra note 5, § 77.

8 See, e.g., Trammel v. United States, 445 U.S. 40 (1980) (striking down the federal privilege for anti-marital facts); Chambers v. Mississippi, 410 U.S. 284 (1973) (admitting evidence despite applicable state exclusionary rule when the state interest in such rules is outweighed by the infringement of the criminal defendant's due process rights); Patterson v. State, 263 Ind. 55, 324 N.E.2d 482 (1972) (overturning the rule that prior inconsistent statements of a witness are not admissible as substantive evidence); cf. United States v. Nixon, 418 U.S. 683 (1977) (refusing to establish a Presidential privilege); Branzburg v. Hayes, 408 U.S. 665 (1972) (refusing to create a constitutional reporter's privilege).


10 Id. at 710.

11 Compare Proposed Federal Rule of Evidence 505, 56 F.R.D. 244 (1972) (limiting the marital privilege to only that for anti-marital facts in criminal cases) with Fed. R. Evid. 501 (privileges to be determined by the applicable federal common law or state law).

The privilege for anti-marital facts, however, has not fared as well as the communication privilege. See, e.g., Trammel v. United States, 445 U.S. 40 (1980) (striking down the federal privilege for anti-marital facts).

12 See, e.g., Shepherd v. State, 227 Ind. 229, 277 N.E.2d 165 (1971) (rejecting state's argument that information acquired as a result of an accomplice relationship between husband and wife should not be considered marital communications). See generally note 74 supra.

13 See notes 83-91 & accompanying text infra.

14 See notes 47-53 & accompanying text supra.
said to be encouraged by the privilege. Thus, rather than promoting marital confidences, the presumption merely serves to avoid difficult questions of intent concerning marital communications. The courts, however, regularly deal with such issues of intent and state of mind in the context of other privileges and in other areas of the law. Although such determinations take time, the costs are outweighed by the vital need for relevant evidence in litigation.

In addition to the courts' unwarranted enlargement of the privilege by means of the presumption of confidentiality, the scope of the marital communication privilege has been extended unnecessarily to include noncommunicative acts. This torturing of the term "communication" has been defended as necessary because of the propinquity of the marital relationship. A marriage is such, it is argued, that information is acquired with no intent to communicate. Although this is undoubtedly true, if there is no intent to communicate there cannot be said to have been a decision on the part of the "communicating" spouse which could have been influenced by the privilege.

Criticism of judicial expansion of the marital communication privilege has been focused primarily on the fact that such expansion does not further the policy of strengthening marriages by means of increased com-

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84 See 8 J. WIGMORE, supra note 4, § 2336.
86 An example of this may be seen in Sexton v. Sexton, 129 Iowa 487, 105 N.W. 314 (1905). After spending several pages explaining that "marital communications," as protected by the Iowa statute, referred only to confidences, and that to expand the privilege's scope any further would not advance the policy of the privilege, the court said:

It may be confessed that what are marital communications cannot be answered according to any fixed rule. The varying circumstances of married life are such that the question must be made to depend for its answer upon the peculiar circumstances of the case out of which it arises. Perhaps no better guide for general observance can be found than to say that impliedly all communications between husband and wife are confidential in character, and hence privileged.

Id. at 494, 105 N.W. at 317.
87 The attorney-client privilege, for example, does not presume confidentiality merely because of the relationship. See C. MCCORMICK, supra note 5, § 91; 8 J. WIGMORE, supra note 4, § 2311. Rather, the circumstances must show that the communication was the sort intended to be confidential. Id.
88 See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (tort; public official required to show actual malice before recovering damages for libel); Barnes v. State, 352 A.2d 409 (Del. 1976) (determining whether declarant actually believed that he was dying before his statement could qualify as a dying declaration).
89 See notes 40-47 & accompanying text supra.
90 8 J. WIGMORE, supra note 4, § 2336; Note, supra note 13, at 221.
91 8 J. WIGMORE, supra note 4, § 2336.
92 See C. MCCORMICK, supra note 5, § 80; R. SLOVENKO, PSYCHOTHERAPY, CONFIDENTIALITY AND PRIVILEGED COMMUNICATIONS § 3 (1966); 8 J. WIGMORE, supra note 4, § 2337; cf. id. § 2306 (discussing the attorney-client privilege).
Marital privilege

Communication between spouses. Although such critiques assume that the underlying rationale of the privilege is realistic, a close study of the privilege indicates that it does not achieve its purported purpose and, consequently, needlessly excludes evidence which should be admitted even when limited to its narrowest scope.

The test most frequently utilized by both courts and commentators to determine the validity of both new and existing communication privileges was developed by Dean Wigmore. In order for any privilege to pass the Wigmore test, it must satisfy all of the following requirements:

1) The communication must originate in a confidence that they [sic] 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 the litigation.

The marital communication privilege, however, fails to satisfy two of these elements. The privilege, as set forth in most statutes, expressly or impliedly requires confidentiality at the time of the communication, and thus satisfies the first requirement. Nevertheless, the courts, by means of the presumption that all marital communication are confidential, have caused the privilege in practice to cease to meet that requirement.

The second and third requirements of the Wigmore test are arguably satisfied by the privilege. Although some sociologists and legal commentators have questioned the need for confidentiality, the marital

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94 See J. WIGMORE, supra note 4, § 2285.
95 Id.
96 See text accompanying notes 47-48 supra.
97 See notes 83-87 & accompanying text supra.
98 See J. CUBER & P. HARROFF, THE SIGNIFICANT AMERICANS (1965); A. SKOLNICK, supra note 19, at 236-70.
99 See, e.g., Hines, Privileged Testimony of Husband and Wife in California, 19 CALIF. L. REV. 390, 411 (1931); Comment, supra note 4, at 781. As early as 1882, the lessening of the need for confidentiality in marriage was suggested: "By the modern enlargement of the wife’s separate contract and property relations . . . the spouses are presented, not so constantly as partakers of one another’s confidence, but rather as persons having adverse interests to maintain . . . ." 1 J. SCHOULER, supra note 32, § 71.
relationship is undeniably intimate. The third element also may be considered satisfied because, despite the increasing social acceptance of divorce and criticism of the traditional marriage, it is still one of the most respected relationships in our society.

The final criterion of the Wigmore test, requiring that the injury to the relationship from disclosure outweigh the benefit to society from the correct disposal of litigation, is one which even some supporters of the marital communication privilege have thought might not be satisfied. The contention that couples will be encouraged to confide in one another by such a privilege is speculative and little data has been offered in support of the assertion. Indeed, the proponents of the privilege have contended that it is up to the detractors to prove that there is no causal link between the privilege and increased marital confidences.

Responding to that challenge, the critics argue that marital communications are not made in contemplation of litigation and, consequently, will not be influenced by evidentiary rules. This is particularly evident when one considers the infrequency with which couples become involved in litigation. In addition, those classes of litigation in which marital communications are most likely to be relevant, interspousal suits, are already outside the privilege’s purview.

Another consideration casting doubt on the efficacy of the privilege in fostering confidences is that few couples are aware of the marital communication privilege. Unlike other relationships protected by similar

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100 See E. Erikson, Childhood and Society (2d ed. 1963) (delineating the intimacy model of marriage); A. Skolnick, supra note 18, at 3-4 (describing the family as the most intimate institution in American society).


102 See A. Skolnick, supra note 18, at 194-206.

103 Note, supra note 13, at 218.

104 See, e.g., 8 J. Wigmore, supra note 4, § 2332; Rothstein, supra note 23, at 131. Wigmore considered the first three elements so well satisfied by the marital communication privilege as to justify its retention despite doubts as to its satisfaction of the final requirement. See 8 J. Wigmore, supra note 4, § 2332.

105 Hines, supra note 99, at 412-13; Morgan, supra note 1, at 150.

106 See, e.g., Reutlinger, supra note 11, at 1391 (“If the burden against it is not clearly carried, the privilege should prevail.”).

107 See, e.g., C. McCormick, supra note 5, § 86; Comment, supra note 19, at 319; Comment, Posthumous Privilege in California, 8 U.C.L.A. L. Rev. 606, 609 (1961).

108 C. McCormick, supra note 5, § 86; see Hutchins & Slesinger, supra note 25, at 682; Comment, supra note 19, at 319.

109 Such suits often concern incidents to which there was only one witness—one of the spouses. It was for this reason that the necessity exception was created. See 1 W. Blackstone, supra note 7, *443-44.

110 See notes 69-70, 73 & accompanying text supra.

111 Proposed Federal Rule of Evidence 505, Advisory Committee Note, 56 F.R.D. 244, 246 (1972); C. McCormick, supra note 5, § 86, n.90; Hines, supra note 99, at 413; Hutchins & Slesinger, supra note 25, at 682; Comment, supra note 19, at 322.
privileges, the marital relationship is not one into which the parties have entered with the guarantee of confidentiality as an inducement; nor is it one in which one party is likely to inform the other of the privilege.

It is also unrealistic to assume that the rules of evidence have any effect on intimate relationships and the confidences which they encompass. Marital confidences are a product of trust and affection; without such sentiments, marital partners are unlikely to be persuaded to confide in one another merely because the communications are inadmissible at trial. Indeed, the marital communication privilege does not ensure that the confidences will not be disclosed in situations other than at trial; unlike the professional communication privileges, the marital privilege is not complemented by a code of ethics requiring that the receiving spouse keep the information confidential.

A final argument distinguishes the marital relation from other similarly privileged relationships. The communication privileges, with the sole exception of the marital privilege, apply to professional relationships, which are almost entirely verbal. While such communications may be important to a marriage, there is a multitude of other factors which play important roles in the success of that relationship. While the success of an attorney-client relationship may depend entirely on the free flow of information, a marriage may be successful without such ease of communication because of the existence of other factors.

Thus, the effectiveness of the marital communication privilege in strengthening marriages is conjectural at best, and, consequently, the injury to the marital relation that would result from the abolition of the privilege is speculative. In contrast, the damage to the judicial process by continued exclusion of often vital evidence is manifest. Therefore,

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112 Orfield, supra note 14, at 144; Comment, supra note 19, at 322.
114 Hutchins & Slesinger, supra note 25, at 681-82 ("If evidentiary rulings had social effects one would never write letters and would live in perpetual fear of some intruder hiding under the bed or in the closet").
115 C. McCormick, supra note 5, § 86; Comment, supra note 19, at 319; Comment, supra note 107, at 609.
116 Comment, supra note 19, at 320.
117 At least one English court, however, has held that marital communications may not be revealed to third parties without permission of the communicating spouse; to do so would subject the revealing spouse to tort liability. See Argyll v. Argyll, [1967] 1 Ch. 302, 322-30.
118 See, e.g., A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, Canon 4: "A Lawyer Should Preserve the Confidences and Secrets of a Client."
120 See id.
121 C. McCormick, supra note 5, § 86.
the injury to the marital relationship from disclosure does not outweigh the benefit to litigation; the fourth element of the Wigmore test is not satisfied.

The continued survival of the privilege despite the contentions that it does not achieve its stated purpose may be explained as mere sentiment on the part of courts and legislatures. Professor McCormick attributed the privilege's longevity solely to feelings of delicacy. Such sensibilities are evident in the argument that the privilege is necessary to avoid the natural repugnance that society would feel witnessing a wife compelled to testify concerning her husband's marital confidences. Referring to "those hallowed confidences inherent in, and inseparable from, the marital status," courts reveal their own feelings of propriety. These sentiments may, in fact, provide a better excuse for the presumption of confidentiality than merely avoiding difficult factual issues. Courts may feel it indelicate to inquire into the content and purpose of those "hallowed confidences" in order to make a finding of intent. While such feelings may conform to present standards of courtesy, they have no place in litigation: "The law . . . does not proceed by sentiment, but aims at justice . . . . This high and solemn duty of doing justice and of establishing the truth is not to be obstructed by considerations of sentiment."

Feelings of delicacy that have no place in a system of evidence and dubious assertions that the privilege ensures connubial bliss are the sole justifications for the marital communication privilege. To erect a rule of privilege on such feeble foundations neglects the central importance of evidence in the judicial system. "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive." The marital communication privilege needlessly obstructs the development of such facts.

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122 See id.
123 See text accompanying notes 38-39 supra.
125 See notes 83-87 & accompanying text supra. The feelings of delicacy held by the courts might also explain the lack of an "in furtherance of a crime" exception; the courts might consider it to be improper to inquire into the content of the communication in order to determine if it were in furtherance of a crime. But see note 74 supra.

Such sentiment is also evident in statutes which define the holder of the marital communication privilege as only the defendant in a criminal suit. See note 61 supra. If spouses may only prevent the revelation of communications when one is a criminal defendant, the scope of the privilege is so slight that even the greatest of supporters might question its effectiveness in encouraging marital confidences. Rather, the only possible justification for such a limited privilege is that legislators find it somehow "indelicate" to convict a man on his wife's testimony.

126 8 J. WIGMORE, supra note 4, § 2228 (discussing the natural repugnance rationale as it was used to support the anti-marital fact privilege).
THE RIGHT OF PRIVACY AND MARITAL CONFIDENCES:
“ONLY THE PENUMBRA KNOWS”

Despite the marital communication privilege’s obstructive impact on litigation and its lack of proven benefit to the marital relationship, its abolition may not be feasible. Constitutional privacy rights may be infringed if such action were taken. It is only after a full consideration of the United States Supreme Court’s traditional protection of the marital relationship and the constitutional right of privacy’s role in that protection that the possibility of abolition, or restructuring, of the privilege may be evaluated.

The Right to Be Let Alone

The family was considered “the primordial social, political and economic unit” by the common law of both England and the United States. Despite these ancient roots, the right of the family to its privacy and autonomy did not gain constitutional protection until the beginning of this century. In Meyer v. Nebraska, the Supreme Court recognized the family as an autonomous unit entitled to protection from undue state regulation. Using substantive due process analysis, the Court found that parents have a fundamental right to determine the upbringing of their children without inordinate state interference.

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128 Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (“[The framers of the Constitution] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”) (emphasis added).

129 Comment, supra note 9, at 1012.


131 The concept of privacy in its broadest sense is as old as the law itself, implicit “in the concept of the individual” and his protection. Henkin, Privacy and Autonomy, 74 Colum. L. Rev. 1410, 1419 (1974). The laws concerning trespassing, eavesdropping and “peeping toms” further protected the privacy of the individual. Id. at 1420. Although the Supreme Court recognized a right to privacy in the fourth and fifth amendments in Boyd v. United States, 116 U.S. 616, 630 (1886), it was not until the seminal article, Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890), that the concept of privacy as a discrete right, protected in tort, emerged. Henkin, supra, at 1420; Comment, supra note 4, at 79 n.178.

132 262 U.S. 390 (1923).

133 In Meyer, the Supreme Court overturned a statute prohibiting the teaching of foreign languages in elementary schools. The majority held that the statute violated both the teachers’ right to teach and the parents’ right to choose to have their children instructed in a foreign language. Id. at 400.

134 See id. at 399. Substantive due process has been described as “the principle that a law adversely affecting an individual’s life, liberty, or property is invalid, even though offending no specific constitutional prohibition, unless the law serves a legitimate governmental objective.” Perry, Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases, 71 NW. U. L. Rev. 417, 419 (1976).

135 262 U.S. at 399.
Justice McReynolds, for the majority, determined that the liberty guarantee of the fourteenth amendment's due process clause "denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children."136

In the years following Meyer, the substantive due process doctrine was discredited, especially in the economic area.137 Although that facet of the doctrine which triggered heightened judicial scrutiny when personal rights were involved had never been expressly overturned,138 continued protection of family autonomy became clothed in equal protection language.139 This reluctance to use substantive due process analysis resulted in the practice of scrutinizing only legislation that impinged upon the fundamental rights which were found in specific constitutional guarantees.140 It was not until the delineation of the constitutional right of privacy141 that the Court was able to free itself from the self-imposed strictures of the previous thirty years.

136 Id.; accord, Pierce v. Society of Sisters, 268 U.S. 510 (1925) (striking down a statute requiring children to attend public schools, finding that the statute interfered with the liberty of parents to direct the education of their children).

137 See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934). See also Justice Black's dissent in Griswold v. Connecticut, 381 U.S. 479 (1965), where he maintains that substantive due process has been "laid to . . . rest once and for all." Id. at 522 (Black, J., dissenting).

138 Comment, supra note 9, at 1013; cf. United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) (suggesting that the presumption of constitutionality, enjoyed by legislation once substantive due process was discredited, might not apply in certain areas). Some members of the Court used substantive due process as a tool with which to enforce the specific guarantees of the Bill of Rights against the states, finding those guarantees to be "implicit in the concept of ordered liberty, and thus, through the fourteenth amendment, becoming valid as against the states." Palko v. Connecticut, 302 U.S. 319, 325 (1937), overruled, Benton v. Maryland, 395 U.S. 784, 794 (1969); see Henkin, supra note 131, at 1418. Compare this with the incorporation doctrine espoused by Justice Black in Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting). Henkin, supra note 131, at 1418; Emerson, Nine Justices in Search of a Doctrine, 64 MICH. L. REV. 219, 223-24 (1965); Kauper, Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case, 64 MICH. L. REV. 235, 237-38 (1965).

139 See, e.g., Skinner v. Oklahoma, 316 U.S. 535 (1942). Although the holding of Skinner was said by the Court to be based on equal protection considerations, the majority stated: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." Id. at 541. This language is more suggestive of substantive due process analysis.

140 Henkin, supra note 131, at 1417. Nevertheless, the Court occasionally used an undefined liberty, avoiding the term substantive due process, to find private rights not expressly provided for in the Bill of Rights. Dixon, The Griswold Penumbra: Constitutional Character for an Expanded Law of Privacy?, 64 MICH. L. REV. 197, 200-01 (1965); Henkin, supra note 131, at 1418.

141 See Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that there is a right of privacy in the penumbras of several provisions of the Bill of Rights). See generally notes 142-58 & accompanying text infra.
The Constitutional Right of Privacy

This right of privacy emerged as a recognized constitutional doctrine in *Griswold v. Connecticut*. Although many commentators considered it merely a revival of the old substantive due process, Justice Douglas, writing for the plurality, expressly rejected the suggestion that the Supreme Court should revert back to such an analysis. Rather, he found a right of privacy in the penumbras of various provisions of the Bill of Rights which reinforced specific guarantees and "[w]ithout which ... the specific rights would be less secure."

Although *Griswold* did not expressly limit the right of privacy to the marital relationship, it did stress that the instant legislation interfered with the most intimate aspect of a sacred relationship. In a great flight of eloquence, Justice Douglas restated the Court's abiding esteem for the marital relationship:

> 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 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.

This deference to the marriage relationship, and in turn to the family, has continued in the post-*Griswold* era. Recent cases have protected

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142 381 U.S. 479 (1965). The Constitution has always been interpreted as protecting some elements of privacy. Henkin, *supra* note 131, at 1420; see, e.g., Boyd v. United States, 116 U.S. 616, 630 (1886). However, these elements had never before been interpreted as adding up to a general right of privacy. Henkin, *supra* note 131, at 1420-21.

143 *See* 381 U.S. at 482. But note that the Court reaffirmed the principle of Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925). 381 U.S. at 482-83. Both cases used substantive due process analysis. *See* notes 132-36 & accompanying text *supra*. *See also* 381 U.S. at 515-16 (Black, J., dissenting).

144 381 U.S. at 484-85.

145 *Id.* at 482-83.


147 381 U.S. at 485-86 ("Would we allow the police to search the sacred precincts of the marital bedrooms for telltale signs of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").

148 *Id.* at 486.

decisions relating to marriage,\textsuperscript{151} procreation,\textsuperscript{152} contraception,\textsuperscript{153} child-rearing,\textsuperscript{154} divorce\textsuperscript{155} and family relationships,\textsuperscript{156} although not always by means of the privacy doctrine.\textsuperscript{157} This trend has reinforced the concept that there is a "private realm of family life which the state cannot enter."\textsuperscript{158}

Despite this continued use of the right of privacy, the new doctrine has done little to extend the right of the individual to "privacy" as that word is commonly used.\textsuperscript{159} Instead, the Supreme Court has utilized the doctrine primarily to ensure autonomy in certain decisions and not to protect against the revelation of private matters.\textsuperscript{160} Nevertheless, two recent decisions\textsuperscript{161} have indicated that the right of privacy does encompass a right to confidentiality of private information in addition to the well-established right to autonomy. These two aspects of the right of privacy need to be considered to determine whether either will preclude an abolition of the marital communication privilege.


\textsuperscript{154} See Wisconsin v. Yoder, 406 U.S. 205 (1972).


\textsuperscript{158} Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

\textsuperscript{159} Henkin, supra note 131, at 1424-25; Comment, Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision, 64 CALIF. L. REV., 1447 (1976). In Paul v. Davis, 424 U.S. 693 (1976), Justice Rehnquist expressed the majority’s reluctance to add anything more than a right to autonomy in decision making:

\begin{quote}
His claim is based not upon any challenge to the State's ability to restrict his freedom of action in a sphere intended to be "private," but instead on a claim that the state may not publicize \ldots. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.
\end{quote}

Id. at 713.

\textsuperscript{160} Henkin, supra note 131, at 1424-25; see notes 150-58 & accompanying text supra.

The Right to Autonomy

Before an interest may be protected under the autonomy branch of the right of privacy, it must be "deemed 'fundamental' or 'implicit in the concept of ordered liberty.'"\textsuperscript{162} The Supreme Court has held that such fundamental interests include "activities relating to marriage, procreation, contraception, family relationships and child rearing and education."\textsuperscript{163} Taken together, this indicates a general right to autonomy which necessarily encompasses marital communications, for without such communications those protected decisions could not be made. Nevertheless, to say that marital communications are included in this branch of privacy does not necessarily mean that compelling the revelation of such communications would violate the Constitution. Before such a conclusion is possible, it must be established that the absence of a marital communication privilege would result in a direct and grievous burden being placed on marital communications.\textsuperscript{164}

This prerequisite of a direct burden was the deciding factor in \textit{Branzburg v. Hayes}\textsuperscript{165} where a reporter contended that the state could not compel him to reveal his sources without violating the freedom of the press.\textsuperscript{166} The Supreme Court concluded that, although the right of the state to compel disclosure of sources did burden the press, such a burden was merely indirect and speculative.\textsuperscript{167} In order for a statute of general applicability to violate the freedom of the press, the majority reasoned, the burden must be more than incidental.\textsuperscript{168}

A showing of the requisite direct burden on marital communications is difficult. Confidences between spouses would not be prohibited nor necessarily inhibited, if the marital communication privilege were to be abolished in any jurisdiction.\textsuperscript{169} The Supreme Court could easily deter-

\textsuperscript{163} \textit{Id.} at 152-53.
\textsuperscript{165} 408 U.S. 665 (1972).
\textsuperscript{166} \textit{Id.} at 679-80. Branzburg did not contend that this should be an absolute privilege. Rather, he contended that the following three prerequisites should be satisfied before compelling a newsman to disclose his sources: 1) that there be sufficient grounds to believe the reporter has evidence relevant to the investigation; 2) that the information not be available from other sources; and 3) that the need for the information be sufficiently compelling to override first amendment concerns. \textit{Id.} at 680.
\textsuperscript{167} \textit{Id.} at 693-94.
\textsuperscript{168} \textit{Id.} at 693-95.
\textsuperscript{169} \textit{See} notes 105-15 & accompanying text \textit{supra}. 
mine that the burden on marital communications is no less speculative than the burden that was imposed on the press in the *Branzburg* case.

A second reason this branch of the right of privacy is unsuitable to support a constitutional demand for a marital communication privilege is that the autonomy branch, by definition, protects decisions. Although it might be argued that the right to autonomy should protect the decision to communicate, the lack of a marital communication privilege does not impose direct restrictions or sanctions on the decision to communicate; it merely adds another factor, the possibility of courtroom disclosure, to be considered.

The Right to Confidentiality

Whatever fundamental right there may be to privacy of marital communications is best protected by the confidentiality branch of the right of privacy. The Supreme Court has dealt with this aspect of the right of privacy only twice. An examination of both these cases will show to what extent the right to confidentiality mandates a marital communication privilege.

*Whalen v. Roe* was the first case in which the Supreme Court recognized a right to confidentiality. The appellees in that case contended that their right of privacy had been violated by a New York statute that required doctors to file with the state the names of patients who had been given prescriptions for certain narcotic drugs. The majority noted that there was included in the right of privacy an “individual interest in avoiding disclosure of personal matters.”

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110 The reporter's privilege would seem more likely to encourage reporter-informant communications than the marital communication privilege does marital communications for several reasons: first, the informant may be induced into such a role by the privilege, 408 U.S. at 693, while a wife is not induced to marry because of the privilege, see text accompanying note 112 supra; second, while affection and trust might prompt confidences between spouses, see text accompanying notes 115-16 supra, informants may not have had previous dealings with a reporter from which to acquire a certain amount of trust, and, as a result, this arm's length dealing may require a privilege to provide the necessary security for the informant; and third, the reporter will be able to advise the informant of the privilege, unlike spouses, see text accompanying note 113 supra.


113 *Id.* at 599-600. The majority quoted a commentator's suggestion that there were three aspects of privacy: the right to be free from government surveillance; the right not to have the government disclose private matters; and the right to be free to make certain decisions. *Id.* at 599 n.24 (quoting Kurland, *The Private I*, U. CHI. MAGAZINE, Autumn, 1976, at 8). The majority suggested that the first interest was protected by the fourth amendment, 429 U.S. at 599 n.24, while the second two were protected by the right of privacy, *id.* at 598-600. Thus, the Supreme Court appears to view the confidentiality strand of privacy as distinct from the fourth amendment's search and seizure provision.

114 429 U.S. at 598-600.

115 *Id.* at 599.
theless, the Court found that the potential for public disclosure of the information under this statute was so slight that the appellees' rights had not been violated.\footnote{176 Id. at 600-02.}

Both of the concurring opinions are enlightening. Although the majority did not find it necessary to discuss what type of test would be used in this branch of privacy,\footnote{177 Id. at 606 (Brennan, J., concurring); see id. at 600 (majority opinion).} Justice Brennan's concurrence contended that had there been a substantial threat of disclosure, the state would have been required to demonstrate that the statute was a necessary means to promote a compelling state interest.\footnote{178 Id. at 606 (Brennan, J., concurring).} Justice Stewart, on the other hand, argued that if there were an interest in confidentiality, that interest would only protect matters concerning marriage, the home or the right to use contraceptives.\footnote{179 Id. at 608-09 (Stewart, J., concurring).} Read together, they suggest that the Supreme Court might have a different attitude towards any attempt to deny a marital communication privilege.

In the second case which considered this aspect of the right of privacy, \textit{Nixon v. Administrator of General Services},\footnote{180 433 U.S. 425 (1977).} the majority did apply a balancing test. Characterizing the public interest in the revelation of the President's documents and tapes as "important," the Court found that the individual interest in preserving the confidentiality of the material, some of which concerned private discussions within the President's family, was outweighed by the information's value to the public.\footnote{181 Id. at 465.} Justice Brennan's majority opinion, however, continually stressed the precautions that were to be taken to prevent disclosure of any facts that were irrelevant or of a private nature.\footnote{182 Id. at 462.} In addition, he emphasized that the bulk of the information was material for which the President had had no expectation of privacy.\footnote{183 Id. at 459.}

Although neither the claimant in \textit{Whalen} nor the claimant in \textit{Nixon} succeeded in obtaining protection for the information involved, assertions that the interest in confidentiality is not as great as the interest in autonomy\footnote{184 E.g., Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978); Comment, supra note 9, at 1015.} are premature. The cases may be explained as concerning only indirect burdens on the right to confidentiality. The likelihood of disclosure of private matters in both cases was slight; both statutes had safeguards which were carefully constructed to protect the privacy of
the individuals involved. With no imminent threat of disclosure, there was no direct burden on privacy interests and thus no need to apply strict scrutiny. A challenge to the denial of a marital communication privilege would, however, involve a direct burden on the privacy of marital confidences. While Nixon and Whalen dealt only with the slight possibility that private information would be disclosed, the denial of the marital communication privilege by a court and its subsequent order that a wife reveal her spouse's confidences would have the same effect as an actual disclosure of private information by the state—an action which Justice Brennan suggested would be subject to strict scrutiny.

In addition to the fact that not having a marital communication privilege would place a direct burden on the right to confidentiality, the traditional deference of the Court to the marital relationship might also prompt more stringent consideration. As this concern for the marital institution has resulted in protection of activities relating to marriage by means of autonomy analysis, the Supreme Court might provide similar protection for the confidentiality of such activities.

The direct burden on marital privacy and the traditional solicitude for the institution of marriage indicate that the Supreme Court would apply strict scrutiny to a state's action in compelling the disclosure of marital confidences. Such a test demands that the state show a compelling interest which is promoted by such action and that the chosen method of furthering that interest be necessary, and not merely rationally related to, the state interest. Whether such a compelling interest exists in the development of all relevant facts in judicial proceedings has been questioned by at least one court. Nevertheless, the Supreme Court has characterized the need for evidence as fundamental to the criminal justice system. In addition, the Court indicated in Branzburg v. Hayes that the state interest in criminal investigation was sufficiently compelling to satisfy such a test. Whether the state has a similarly compel-

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186 In confidentiality analysis there is less difficulty with the direct/indirect dichotomy than that involved in the autonomy branch. See text accompanying notes 162-70 supra. In the latter branch, the inquiry is concerned with how the state action affects the protected decision. Id. However, in the confidentiality branch of privacy, the act of disclosure directly destroys the privacy.

187 See text accompanying note 178 supra.

188 See text accompanying notes 129-58 supra.

189 See text accompanying notes 151-56 supra.


189 408 U.S. at 700-01 (suggesting in dictum that the interest in "extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing . . . violent disorder . . ." was compelling).
ling interest in the ascertainment of truth in civil litigation is unclear, but the cases have indicated that it may not.\textsuperscript{194}

Having established its overriding interest in the disclosure of relevant evidence in criminal cases, the state must proceed to demonstrate that the denial of the marital communication privilege is necessary to promote that interest.\textsuperscript{195} The need for such evidence may vary from case to case depending on factors such as the possibility of obtaining equivalent evidence from other sources and how essential such evidence is to either the defense or prosecution.\textsuperscript{198} Having determined that a limited marital communication privilege is constitutionally mandated, the Court will need an outline for the privilege.

**THE NEW PRIVILEGE**

The delineation of the constitutional marital communication privilege involves a balancing of the central need for evidence against the right to marital confidentiality. Both concepts have been widely recognized.\textsuperscript{197} This balancing between two such important interests could result in the formulation of a privilege that is carefully tailored to exclude only that evidence which is necessarily constitutionally protected. In order to keep the disruption to litigation at a minimum, an inquiry must be made into what confidences are so integral to the marital relationship as to require constitutional protection.

In dealing with the marital relationship and the right of privacy, the Supreme Court has continually referred to the "intimacies" or "in-
timate relation[s]" of husband and wife. When the right of privacy was the sole grounds for invalidating legislation, the decisions concerned abortion and contraception. This suggests that only the most intimate communications between husband and wife may be constitutionally inaccessible and therefore protected from revelation. Such intimate communications would probably include those concerning sexuality and affectional statements.

The intimacies to be protected would no longer be limited to statements or acts that are intended to convey a message. Because the purpose of the constitutional privilege would be to protect the privacy of marital intimacies—not to encourage marital communications—the scope of the privilege should include actions irrespective of their informational content.

Whether such intimate acts and communications are excluded by the constitutional privilege will depend on the need which the offering party has for the information. Although such a need varies according to the individual case, the Supreme Court may try to enunciate a general rule that the communications that are to be admitted must be necessary to establish an essential element of the defense or prosecution and be available from no other source. Although this may exclude cumulative evidence essential to the persuasiveness of the case, the alternative would be to embroil the courts in countless appeals concerning the degree to which the evidence must be needed before disclosure may constitutionally be required.


This limitation would be in keeping with the marital relationship as it exists today. No longer is it a unit held together by the multitude of functions it performed in the past. See A. Skolnick, supra note 18, at 84-108; B. Yorburg, The Changing Family 114-19 (1973). Hutchins and Slesinger suggest that the economic production function of the family was the true reason for the marital privileges. Hutchins & Slesinger, supra note 25, at 677. Today, they argue, the typical marriage is cemented by affection and sexuality only.

Without this need, the method of acquiring the evidence—denying the marital communication privilege—is not "necessary" to the promotion of the state interest in facilitating the search for truth. See text accompanying notes 189-90 supra.

See Comment, supra note 4, at 802; cf. C. McCormick, supra note 5, § 77, at 159-60 (suggesting the decision to grant a privilege in a specific case be made by balancing the needs of the litigants with the privacy interests at stake).

The Court is unlikely to use a balancing test only, with its attendant uncertainties and appeals; it would be "unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination." Branzburg v. Hayes, 408 U.S. 665, 703 (1972). See generally id. at 701-05.
CONCLUSION

The marital communication privilege as it exists in most jurisdictions is an ineffective attempt to promote marital harmony. The only function that it serves is to obstruct the search for truth. Right of privacy considerations, nevertheless, preclude the complete abolition of the marital communication privilege. The right of married couples to privacy in their intimate communications and activities is constitutionally protected.

This note has outlined a formulation of the marital communication privilege which comports with the constitutional privacy requirements. Its essential characteristics include limited applicability in criminal cases, coverage of only sexual or affectional communications and acts, and a requirement that the evidence sought be both necessary to an essential element of the case and unavailable from any other source before the privilege is ruled inapplicable. Such a privilege would provide the necessary protection of privacy interests while giving adequate consideration to the need for evidence in an adversary system of justice.

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