

*21<sup>st</sup> Century Pillow-Talk:  
Applicability of the Marital Communications Privilege to Electronic Mail*

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## **Abstract**

This article is the first to explore whether the marital communications privilege, which protects from disclosure private communications between spouses, should attach to communication sent via Web-based email. Traditionally, the privilege does not attach where a third party learns, either intentionally or inadvertently, the content of an otherwise private communication. In the world of Web-based email, disclosure to a third party is necessary in order for successful communication to occur. Writers of Web-based email draft a message and store it on a third-party Internet Service Provider's (ISP) server until the recipient reads the message. Even after the email has been delivered, a copy may remain on the ISP's server indefinitely. This article investigates whether this process is inherently at odds with the marital communications privilege. This article will also explore whether marital communications should continue to be protected despite the privilege's failure to meet some of its stated purposes.

21<sup>st</sup> Century Pillow-Talk: Applicability of the Marital Communications  
Privilege to Electronic Mail

By Mikah K. Story\*  
Associate Professor of Law  
University of Missouri-Kansas City

**Introduction**

Consider the following hypothetical (“Hypothetical #1): Harold Smith has just committed a homicide. Harold’s boss discovered that he had been embezzling his 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 keeps 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 are unable to learn the contents of the letter.

Now, consider the following hypothetical (“Hypothetical #2”): The facts are identical to those of Hypothetical #1 with one significant change. Rather than writing Wendy a letter, Harold visits an internet café in Mexico City and sends Wendy an email from his Hotmail account to her Hotmail account. During the police officers’ questioning of Wendy, she admits

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\* 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 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.

that she received an email from Harold, but she refuses to disclose the contents of the email. Not to be deterred, the police officers contact the assistant District Attorney on the case and explain the situation. The assistant D.A. prepares a subpoena directed to Microsoft, the operator of Hotmail. The subpoena demands production of any emails sent between Harold's account and Wendy's account during the week following the homicide. Microsoft complies with the subpoena and produces the emails, which are stored on a server owned by Microsoft.

Most would agree that the marital communications privilege protects the communication between Harold and Wendy as described in Hypothetical #1. However, the change in the form of communication, as described in Hypothetical #2, could affect application of the privilege. This article will take 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 where a third party, without the knowledge of or involvement by the recipient-spouse,<sup>1</sup> intentionally or inadvertently discovers the communication.<sup>2</sup> In the context of electronic communication,<sup>3</sup> where Internet Service Providers have access to otherwise confidential communications, the marital communications privilege may not apply at all. Indeed, it could be argued that the marital communications privilege is inherently at odds with this form of communication.

This article has two purposes. First, it will explore whether the marital communications privilege currently protects email communication and whether the privilege should protect such communication. Second, it will address whether the marital communications privilege should continue to exist considering the traditional purposes of the privilege. Part I of the article will

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<sup>1</sup> A "recipient-spouse" is defined as the spouse who receives the communication from the "communicating spouse".

<sup>2</sup> See *infra* notes 22 through 23 and accompanying text.

<sup>3</sup> "Electronic communication" is limited, for purposes of this article, to electronic mail. Other forms of electronic communication, including text messaging, instant messaging and cellular phone conversations are outside the purview of this article.

discuss the history of the marital communications privilege. Part II will explore the details of email storage and address constitutional and statutory provisions outside the context of the marital communications privilege that provide some privacy protection for electronic communications. Part III of the article will take a critical look at whether the marital communications privilege applies to electronic communication based on more traditional applications of the privilege and highlight three legislative solutions that have been put in place to protect privileged communications made electronically. Part IV will discuss whether courts should reconsider the marital communications privilege as a whole considering the stated purposes of the privilege. Part V of the article will provide a conclusion.

## **I. 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 U.S. Supreme Court, the rule was borne of two canons of medieval jurisprudence: “[F]irst, 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.”<sup>4</sup> 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.<sup>5</sup>

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<sup>4</sup> Trammel v. U.S., 445 U.S. 40, 44 (1979). 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.8 (comparing application of the original testimonial privilege to cases holding the testimony of slaves inadmissible against their masters).

<sup>5</sup> 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 U.S. Supreme Court abolished the rule disqualifying spouses from testifying in each other's behalf;<sup>6</sup> however, a privilege remained that prevented either spouse from providing adverse testimony against the other.<sup>7</sup> The rationale for the testimonial privilege is its role in protecting marital harmony and the sanctity of the marital relationship.<sup>8</sup> In Hawkins v. U.S., 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.<sup>9</sup> Over 20 years later, in Trammel v. U.S., 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.<sup>10</sup>

The communications privilege was expressly recognized by the Supreme Court in 1934.<sup>11</sup> In Wolfe v. U.S., 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."<sup>12</sup> The

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<sup>6</sup> Funk v. U.S., 290 U.S. 371, 386-87. In Funk, the Court noted a major change in the common law in that defendants are no longer disqualified from testifying in their own behalf. 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. at 381. 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, making the issue of bias an issue of credibility rather than competency to testify. Id. at 380.

<sup>7</sup> Id. at 373. See also Hawkins v. U.S., 358 U.S. 74, 76 (1958) ("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.").

<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> 445 U.S. at 53. The Court reasoned that where 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.

<sup>11</sup> See Wolfe v. U.S., 291 U.S. 7.

<sup>12</sup> Id. at 14. 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

purpose of the marital communications privilege is very similar to 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, in that each of these privileges is “rooted in the imperative need for confidence and trust.”<sup>13</sup>

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.<sup>14</sup> One way to overcome the presumption is to show that the communication was made in the presence of a third party.<sup>15</sup> In Wolfe, the government sought to introduce into evidence a letter written by the Petitioner to his wife. Although this type of communication would normally be protected by the privilege, the government argued that Petitioner’s utilization of his personal stenographer to write the letter prevented the marital communications privilege from attaching.<sup>16</sup> The government sought to introduce the contents of the letter not through the testimony of the wife, but through the stenographer, who had kept her notes. 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.<sup>17</sup> The Court agreed, holding that the privilege

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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.”)

<sup>13</sup> 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.”).

<sup>14</sup> Wolfe, 291 U.S. at 14; accord Pereira v. U.S., 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.”); Blau v. U.S., 340 U.S. 332, 333 (1951).

<sup>15</sup> Wolfe, 291 U.S. at 14.

<sup>16</sup> Id. at 13.

<sup>17</sup> Id.

did not prevent disclosure of the contents of the letter.<sup>18</sup> According to the Court, disclosure to the stenographer was voluntary and unnecessary. Thus, the Petitioner's decision to reveal the communication to a third party destroyed any privilege that would have otherwise attached to the communication.<sup>19</sup>

This rule (hereinafter the "third party presence rule") is in accord with the courts' desire to construe the privilege narrowly due to its role in "obstruct[ing] the truth-seeking process."<sup>20</sup> Additionally, while the purpose of the communications privilege is the preservation of marital confidences, courts reason that this purpose is not thwarted if the communication can be brought into evidence through a third party.<sup>21</sup> It is important to note that 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 intentionally discloses the communication to the third party.<sup>22</sup> 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 in confiding in his or her spouse.<sup>23</sup>

Many commentators have criticized the communications privilege,<sup>24</sup> with some arguing that courts should abandon the privilege entirely.<sup>25</sup> Opponents of the privilege argue that it

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<sup>18</sup> Id. at 17.

<sup>19</sup> 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 (Mass. 1924); Cowser v. State, 157 S.W. 758 (Tex. Crim. App. 1913); Fuller v. Fuller, 130 S.E. 270 (W.Va. 1925)).

<sup>20</sup> U.S. v. Marashi, 913 F.2d 724, 730 (9<sup>th</sup> Cir. 1990).

<sup>21</sup> See State of Kansas v. Myers, 640 P.2d 1245, 1248-49 (Kan. 1982) (finding that the third party presence rule assists in the discovery of the truth while protecting confidential communications between husband and wife).

<sup>22</sup> See e.g., id., 640 P.2d at 1248 (citing 8 WIGMORE EVIDENCE § 2339 (3<sup>rd</sup> ed. 1940)).

<sup>23</sup> See Yokie v. State of Florida, 773 So.2d 115, 117 (Fla. 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. 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 deliberating misleading [Defendant] into feeling safe in making the otherwise privileged disclosures." Id.

<sup>24</sup> See, e.g., People v. Hamacher, 438 N.W.2d at 56 (noting that both marital privileges have been highly criticized).

blocks the truth-seeking process while failing to adequately promote marital harmony.<sup>26</sup> Others have argued that the communications privilege “perpetuate[s] the role of male domination in the marriage” because the privilege is usually invoked by a husband to prevent his wife’s disclosure of confidential communications, thereby benefiting men more often than women.<sup>27</sup> Finally, opponents of the privilege have argued that the privilege is unnecessary, considering the fact that most married couples are unaware of its existence.<sup>28</sup> 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 codified the testimonial privilege but failed to mention the communications privilege.<sup>29</sup> In the Advisory Committee Notes following the proposed Rule, the Committee stated that the communications privilege was not recognized by Rule 505 because it could not be assumed that marital conduct would be influenced by a privilege “of whose existence the parties in all likelihood are unaware.”<sup>30</sup> 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.<sup>31</sup> Congress rejected proposed Rule 505 along with eight other proposed rules that would have codified various evidentiary privileges<sup>32</sup> and enacted Rule 501,

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<sup>25</sup> See generally DePrez, *supra* note 12. DePrez 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.

<sup>26</sup> See McCormick, EVIDENCE § 86 (3d ed.) (stating that “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 is at best doubtful and marginal.”).

<sup>27</sup> *People v. Hamacher*, 438 N.W.2d at 56, n. 5.

<sup>28</sup> See DePrez, *supra* note 12, at 136.

<sup>29</sup> See Proposed Fed. R. Evid. 505.

<sup>30</sup> See Proposed Fed. R. of Evid. 505, Advisory Committee Note, 56 F.R.D. 244, 246.

<sup>31</sup> *Id.*

<sup>32</sup> See Proposed Fed. R. of Evid. 502 (required reports privilege); Proposed Fed. R. of Evid. 503 (attorney-client privilege); Proposed Fed. R. of Evid. 504 (psychotherapist-patient privilege); Proposed Fed. R. of Evid. 505 (spousal testimonial privilege); Proposed Fed. R. of Evid. 506 (clergy-communicant privilege); Proposed Fed. R. of Evid. 507 (political vote privilege); Proposed Fed. R. of Evid. 508 (trade secrets privilege); Proposed Fed. R. of Evid. 509 (secrets of state privilege); Proposed Fed. R. of Evid. 510 (identify of informant privilege).

which was intended to “provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.”<sup>33</sup>

Despite criticism of the rule, the marital communications privilege is quite prevalent. The privilege is codified in 49 states and the District of Columbia.<sup>34</sup> 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 common law.<sup>35</sup> Additionally, courts in 47 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.<sup>36</sup>

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<sup>33</sup> 120 Cong.Rec. 40891 (1974) (statement of Rep. Hungate) (*quoted in Trammel v. U.S.*, supra note \_\_, at 911).

<sup>34</sup> See Al. R. Evid. Rule 504 (West 2006); Ak. R. Rev. Rule 505 (West 2006); Ariz. Rev. Stat. Ann. § 12-2232 (West 2006); Ar. R. Rev. Rule 504 (West 2006); Cal. Evid. Code § 917(a) (West 2006); Colo. Rev. Stat. Ann. § 13-90-107 (West 2006); De. R. Rev. Rule 504 (West 2006); D.C. Code Ann. § 14-306 (West 2006); Fla. Stat. Ann. § 90.504 (West 2006); Ga. Code Ann. § 24-9-21(1) (West 2006); Hi. R. Rev. Rule 505 (West 2006); Id. Code Ann. § 9-203.1 (West 2006); 735 Ill. Comp. Stat. Ann. 5/8-801 (West 2006); In. Code Ann. § 34-46-3-1(4) (West 2006); Iowa Code Ann. § 622.9 (West 2006); Kan. Stat. Ann. § 60-428 (2005); Ky. R. Evid. Rule 504 (West 2006); La. Code Evid. Ann. art. 504 (West 2006); Me. Rev. Stat. Ann. tit. 15 § 1315 (West 2006); Md. Code Ann. Cts. & Jud. Proc. § 9-105 (West 2006); Mass. Gen. Laws Ann. ch. 233 § 20 (West 2006); Mich. Comp. Laws Ann. § 600.2162(7) (West 2006); Minn. Stat. Ann. § 595.02(a) (West 2006); Ms. R. Rev. Rule 504 (West 2006); Mo. Ann. Stat. § 546.260 (West 2006); Mont. Code Ann. § 26-1-802 (2006); Neb. Rev. Stat. § 27-505 (2006); Nev. Rev. Stat. Ann. § 49.295 (West 2006); N.H. R. Rev. Rule 504 (West 2005); N.J. Stat. Ann. § 2A:84A-22 (West 2006); N.M. Stat. Ann. § 38-6-6(A) (West 2006); N.Y. C.P.L.R. § 4502 (McKinney 2006); N.C. Gen. Stat. Ann. § 8-57(c) (West 2006); N.D. R. Rev. Rule 504 (West 2006); Ohio Rev. Code Ann. § 2945.42 (West 2006); Okla. Stat. Ann. tit. 12 § 2504 (West 2006); Or. Rev. Stat. Ann. § 40.255 (West 2006); 42 Pa. Cons. Stat. Ann. § 5914 (West 2006); R.I. Gen. Laws § 9-17-13 (2005); S.C. Code Ann. § 19-11-30 (2005); S.D. Codified Laws § 19-13-13 (2006); Tenn. Code Ann. § 24-1-201 (West 2006); Tex. Rule Evid. 504 (2006); Utah Code Ann. § 78-24-8(1) (West 2006); Vt. R. Evid. Rule 504 (West 2006); Va. Code Ann. § 19.2-271.2 (West 2006); Wash. Rev. Code § 5.60.060(1) (West 2006); W. Va. Code Ann. § 57-3-4 (West 2006); Wis. Stat. Ann. § 905.05 (West 2006); 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 of Connecticut v. Christian, 841 A.2d 1158, 1173 (Conn. 2004).

<sup>35</sup> 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 also S.E.C. v. Lavin, 111 F.3d 921, 925 (9<sup>th</sup> Cir. 1997) (“The federal common law recognizes two types of marital privileges: the privilege against adverse spousal testimony and the confidential marital communications privilege.”). Accord U.S. v. Hook, 781 F.3d 1166, 1173 n.11 (6<sup>th</sup> Cir. 1986).

<sup>36</sup> See Arnold v. State, 353 So.2d 524, 527 (Ala. 1977); State v. Summerlin, 675 P.2d 686, 694-95 (Ariz. 1984); Metcalf v. State, 681 S.W.2d 344, 346 (Ark. 1984); People v. Gaines, 375 P.2d 296, 300 (Cal. 1962), overruled on other grounds by People v. Morse, 388 P.2d 33 (Cal. 1964); Thrap v. People, 558 P.2d 576, 578 (Colo. 1977); State v. Christian, supra note \_\_, at 1178; Weedon v. State, 647 A.2d 1078, 1081 (Del. 1994); Beard v. U.S., 535 A.2d 1373, 1381 (D.C. 1988); Proffitt v. State, 315 So.2d 461, 464 (Fla. 1975); Williams v. State, 77 S.E. 818, 818 (Ga. 1913); 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); State v. Myers, 640 P.2d 1245, 1248-49 (Kan. 1982); Ewing v. May, 705

## II. Web-Based Electronic Mail

This article will analyze the marital communications privilege as it relates to Web-based email.<sup>37</sup> Web-based email is sent from the writer to the recipient by means of a third party server.<sup>38</sup> These third parties, who store and process a user's emails, are called Internet Service Providers ("ISPs").<sup>39</sup> Rather than accessing an email by downloading it onto his or her personal computer, a user of Web-based email can access the email from any computer via the World Wide Web.<sup>40</sup> The email message sits on the ISP's server for an undetermined amount of time, sometimes even after the email has been deleted by the recipient.<sup>41</sup>

In recent years, Web-based email has become increasingly popular. ISPs like Google, MSN and Yahoo! have increased the amount of free storage space that they provide to users of

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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); 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. 2002); State v. Shafer, 609 S.W.2d 153, 155 (Mo. 1980); State v. Nettleton, 760 P.2d 733, 737 (Mont. 1988); 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, 930-31 (N.H. 1992); State v. Szemple, 640 A.2d 817, 822 (N.J. 1994); State v. Teel, 712 P.2d 792, 794 (N.M. Ct. App. 1985); 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. McMorro, 314 N.W.2d 287, 292 (N.D. 1982); State v. Rahman, 492 N.E.2d 401, 405 (Ohio 1986); McHam v. State, 126 P.3d 662, 671 (Okla. Crim. App. 2005); Coles v. Harsch, 276 P.2d 248, 252 (Or. 1929); Commonwealth v. May, 656 A.2d 1335, 1342 (Pa. 1995); State v. McKercher, 332 N.W.2d 286, 288 (S.D. 1983); Hazlett v. Bryant, 241 S.W.2d 121, 123 (Tenn. 1951); Zimmerman v. State, 750 S.W.2d 194, 199 (Tex. Crim. App. 1988); State v. Musser, 175 P.2d 724, 737 (Utah 1946); In re Buckman's Will, 24 A. 252, 252 (Vt. 1892); Menefee v. Commonwealth, 55 S.E.2d 9, 13 (Va. 1949); State v. Thorne, 260 P.2d 331, 336-37 (Wash. 1953); State v. Bohon, 565 S.E.2d 399, 404 (W. Va. 2002); Kain v. State, 179 N.W.2d 777, 780 (Wis. 1970); Curran v. Pasek, 886 P.2d 272, 275 (Wyo. 1994). Alaska and South Carolina courts have not addressed the third party presence rule. But see Campbell v. Chase, 1879 WL 3538, at \*1 (R.I. April 12, 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, for "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.").

<sup>37</sup> Email downloaded to a user's home or work computer is outside the purview of this article.

<sup>38</sup> James X. Dempsey, Digital Search & Seizure: Updating Privacy Protections to Keep Pace with Technology, 865 PLI/Pat 505, 517 (2006).

<sup>39</sup> 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 U.S. v. Maxwell, 45 M.J. 406, 417 (C.A.A.F. 1996) (noting that America On-Line stores its customers' emails at a privately-owned computer bank in Vienna, Virginia).

<sup>40</sup> Dempsey, supra note 38, at 517.

<sup>41</sup> 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.").

their Web-based email systems.<sup>42</sup> As one commentator noted, ISPs will continue to increase storage in order to ensure that customers will use the email services more often and to make sure customers have no reason to delete old emails.<sup>43</sup>

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

#### **A. Privacy Agreements**

Most ISPs enter into privacy agreements with their users.<sup>44</sup> Typically, the privacy agreements address the extent to which ISPs collect users' personal information and provide such information to other parties.<sup>45</sup> For example, the privacy policies provided by Microsoft, Google and Yahoo! all state that the ISPs will not sell personal information to third parties, but that the ISPs will provide information in order to comply with the law.<sup>46</sup>

Most ISP privacy policies contain no information regarding the deletion of emails from the ISP server once the email has been deleted from the user's account,<sup>47</sup> however, Google's Gmail Privacy Policy notifies customers that deleted email will take immediate effect in the

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<sup>42</sup> Id. at 516-517.

<sup>43</sup> Id. at 517 (citing Janis Mara, "MSN Hotmail Upgrades E-Mail, Increases Storage," ClickZ News (June 24, 2004), [www.clickz.com/news/article.php/3372781](http://www.clickz.com/news/article.php/3372781)).

<sup>44</sup> See, e.g., Gmail Privacy Policy, <http://gmail.google.com/mail/help/privacy.html>, (last visited Aug. 6, 2006); Microsoft Online Privacy Statement, <http://privacy.microsoft.com/en-us/fullnotice.aspx> (last visited Aug. 6, 2006); Yahoo! Privacy Policy, <http://privacy.yahoo.com/privacy/us/> (last visited Aug. 6, 2006).

<sup>45</sup> Id.

<sup>46</sup> Google Privacy Policy, <http://www.google.com/privacy.html> (last visited Aug. 6, 2006) ("Google only shares personal information with other companies or individuals outside of Google . . . [when] we have a good faith belief that access, use or preservation or disclosure of such information is reasonably necessary to (a) satisfy any applicable law, regulation, legal process or enforceable government request."); Microsoft Online Privacy Statement, supra note 44 ("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 44 ("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 38, at 523 ("Virtually every privacy policy . . . allows for disclosure in response to a government demand.").

<sup>47</sup> Id.

user's account view, but "residual 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."<sup>48</sup> Thus, email that has been deleted from a user's account and that is no longer visible in the user's email account 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 where [they] live."<sup>49</sup> This article will now address those legal protections.

## **B. Fourth Amendment Protection**

The Fourth Amendment to the U.S. Constitution protects citizens against unreasonable searches and seizures and requires that search warrants be issued only upon a finding of probable cause.<sup>50</sup> The Supreme Court defines probable cause as "[A] reasonable ground for belief of guilt . . . and . . . the belief of guilt must be particularized with respect to the person to be searched or seized."<sup>51</sup> In order for a person to assert protection under the Fourth Amendment, she must establish a legitimate expectation of privacy that was violated by the government.<sup>52</sup> This inquiry has two parts: the person must establish (1) an actual or subjective expectation of privacy, and (2) an objective expectation of privacy, or "one that society is prepared to recognize as 'reasonable.'"<sup>53</sup>

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<sup>48</sup> Gmail Privacy Policy, *supra* note 44.

<sup>49</sup> Google Privacy FAQ, [http://www.google.com/privacy\\_faq.html](http://www.google.com/privacy_faq.html) (last visited Aug. 6, 2006).

<sup>50</sup> U.S. Const. amend. IV.

<sup>51</sup> *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (internal quotations and citations omitted).

<sup>52</sup> *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

<sup>53</sup> *Katz v. U.S.*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). *See also Smith*, 442 U.S. at 740 (citing Justice Harlan's test as the appropriate Fourth Amendment inquiry).

Taking into account the Supreme Court’s Fourth Amendment jurisprudence, it is unclear whether the Fourth Amendment provides adequate protection to Web-based email accounts. In U.S. v. Miller, the Court held that a person has no legitimate expectation of privacy in information he voluntarily provides to third parties.<sup>54</sup> 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.”<sup>55</sup> In the Court’s view, when a person provides personal information to third parties, he assumes the risk that the third party will reveal the information to the government.<sup>56</sup>

Based on the holding of Miller, several lower courts have found that holders of Web-based email accounts have no legitimate expectation of privacy in subscriber information provided to ISPs.<sup>57</sup> Subscriber information includes a user’s name, address, birthday and password.<sup>58</sup> More importantly, lower courts have held that once an email message has been delivered to the recipient, the sender has no reasonable expectation of privacy in its contents.<sup>59</sup> As the Sixth Circuit Court of Appeals has found, once an email reaches its recipient, “the e-

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<sup>54</sup> 425 U.S. 435, 442 (1976). In Miller, the Court found that a bank depositor has no legitimate expectation of privacy in financial information voluntarily provided to his banks and the bank’s employees. Id.

<sup>55</sup> Id. at 443.

<sup>56</sup> Id.

<sup>57</sup> See, e.g., Guest v. Leis, 255 F.3d 325, 336 (6<sup>th</sup> Cir. 2001) (finding that electronic bulletin board users lack a Fourth Amendment privacy interest in their subscriber information because they revealed it to a third party); U.S. v. Cox, 190 F.Supp.2d 330, 332 (N.D.N.Y. 2002); U.S. v. Kennedy, 81 F.Supp.2d 1103, 1110 (D. Kan. 2000); U.S. v. Hambrick, 55 F.Supp.2d 504, 507-09 (W.D. Va. 1999).

<sup>58</sup> Guest, 255 F.3d at 335.

<sup>59</sup> See, e.g., U.S. v. Jones, 149 Fed.Appx. 954, 959 (11<sup>th</sup> Cir. 2005); U.S. 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 do 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; U.S. v. Charbonneau, 979 F.Supp. 1177, 1184 (S.D. Ohio 1997); U.S. v. Maxwell, 45 M.J. at 418 (finding that once an email is delivered, “the transmitter no longer controls its destiny.”); Commonwealth v. Proetto, 771 A.2d 823, 831 (Pa. Super. 2001) (no expectation of privacy in emails forwarded to the police).

mailer would be analogous to a letter-writer, whose expectation of privacy ordinarily terminates upon delivery of the letter.”<sup>60</sup>

Indeed, due to manner in which ISP searches are conducted, the Fourth Amendment may provide no protection at all to Web-based email accounts. As one commentator notes, government investigators do not search the ISPs’ servers directly; rather, they usually provide the ISPs with a grand jury subpoena compelling copies of the users’ emails.<sup>61</sup> The government may issue such a grand jury subpoena even if the emails are protected by the Fourth Amendment.<sup>62</sup> Additionally, unlike a search warrant, a grand jury subpoena may be issued in the absence of probable cause.<sup>63</sup> So long as the subpoena is reasonable, it will comply with the requirements of the Fourth Amendment.<sup>64</sup>

### **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

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<sup>60</sup> Guest, 255 F.3d at 333 (internal quotations and citations omitted).

<sup>61</sup> Kerr, supra note 39, at 1211.

<sup>62</sup> In re Subpoena Duces Tecum, 228 F.2d 341, 347 (4<sup>th</sup> Cir. 2000)

<sup>63</sup> 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 the probable cause requirement.” (quoting U.S. Const. amend. IV)).

<sup>64</sup> In re Subpoena Duces Tecum, 228 F.2d at 347 (citing Hale v. Henkel, 201 U.S. 43, 76 (1903)). 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.2d at 348.

1986.<sup>65</sup> Several provisions of the ECPA concern stored data such as Web-based email.<sup>66</sup> This portion of the statute is commonly referred to as the Stored Communications Act (“SCA”).<sup>67</sup>

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.<sup>68</sup> The electronic communication service temporarily stores the communication pending delivery. In most cases, the communication is temporarily stored on the provider’s server even after delivery.<sup>69</sup> The second type of service is known as a “remote computing service” (“RCS”).<sup>70</sup> When the SCA was enacted in 1986, consumers often used such services to store extra files or process large amounts of data.<sup>71</sup> Remote computing services often retained copies of their customers’ files for long periods of time.<sup>72</sup> 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 long-term.

The type of protection afforded to an electronic communication turns on whether the ISP is an ECS or an RCS as well as the amount of time the communication has been stored with the

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<sup>65</sup> Public Law No. 99-508, 100 Stat. 1848 (codified as 18 U.S.C. § 2510, et seq.). See also Kerr, supra note 39, 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.”).

<sup>66</sup> 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.

<sup>67</sup> See Dempsey, supra note 38, at 521; Kerr, supra note 39, at 1208.

<sup>68</sup> 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).

<sup>69</sup> See Kerr, supra note 39, at 1213.

<sup>70</sup> 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).

<sup>71</sup> See S. Rep. No. 99-541, at \*3, reprinted at 1986 U.S.C.C.A.N. 3555, 3557.

<sup>72</sup> Id.

provider.<sup>73</sup> 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.<sup>74</sup> If the communication is stored with the ECS for more than 180 days, the government may access it with a subpoena<sup>75</sup> or a court order<sup>76</sup> and prior notice to the subscriber.<sup>77</sup> 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.<sup>78</sup>

In sum, electronic communications like Web-based emails are afforded no more protection under the SCA than the Fourth Amendment unless they have been stored for 180 days or less, assuming that ISPs who provide Web-based emails are even considered providers of ECS. One commentator has argued that providers of Web-based email are multifunctional and that they can serve as ECS and RCS for a particular communication at any given time.<sup>79</sup> For example, a provider who holds an email in intermediate storage until its recipient views it would be considered an ECS.<sup>80</sup> As stated earlier, to access such an email, the government would need a search warrant. This protection is identical to the Fourth Amendment protection provided to

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<sup>73</sup> The SCA defines “electronic storage” as “(A) any 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 email would be considered “electronic storage” under the SCA even if the customer deletes the email immediately after reading it. It follows that electronic storage would also include an ISP’s retention of an email in a customer’s inbox after the customer has read it but not deleted it. Indeed, if the ISP stores a copy of the email for backup purposes even after the customer has deleted it from her inbox, the retention of the email would still be considered electronic storage.

<sup>74</sup> 18 U.S.C. § 2703(a).

<sup>75</sup> The reasonableness standard for the issuance of subpoenas is discussed at Section II.B, *supra*.

<sup>76</sup> In order for a court order to be issued under the SCA, the government must show “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).

<sup>77</sup> 18 U.S.C. § 2703(a)-(b). The government may delay notice to the subscriber by up to 90 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).

<sup>78</sup> *Id.* 2703(b).

<sup>79</sup> Kerr, *supra* note 39, at 1215-16.

<sup>80</sup> See *supra* note 68 and accompanying text. *Accord In re DoubleClick, Inc. Privacy Litig.*, 154 F.Supp.2d 497, 511-12 (S.D.N.Y. 2001).

emails that have not yet been delivered.<sup>81</sup> However, if the recipient leaves the email in her inbox (and on the ISP's server) after reviewing it, the ISP may be serving as an RCS.<sup>82</sup> If this characterization is correct, then the government would be allowed to access opened emails with a subpoena or a court order, and neither of these authorizations requires probable cause.<sup>83</sup> Under this scenario, the SCA provides no more protection to opened emails than the Fourth Amendment provides.<sup>84</sup>

Neither the Fourth Amendment nor the SCA provides a great level of protection for Web-based emails. The marital communications privilege is the only barrier preventing law enforcement access to confidential spousal communications sent via email. However, as Section III of this article will demonstrate, the very nature of Web-based email likely prevents the privilege from attaching at all.

### **III. Analysis of the Marital Communications Privilege as Applied to Web-Based Email**

Case law concerning 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 email, a number of analogies will demonstrate that the marital communications privilege is inapplicable to Web-based email under current law.

#### **A. Applicability of the Marital Communications Privilege to Letters**

It is quite logical to compare an email to a letter. Both are written forms of communication where a writer drafts a message and sends it to its recipient. Thus, if the marital

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<sup>81</sup> See *supra* note 59 and accompanying text.

<sup>82</sup> See Kerr, *supra* note 39, at 1216 (“The traditional understanding has been that a copy of opened email sitting on a server is protected by the RCS rules, not the ECS rules. The thinking is that when an email customer leaves a copy of an already-accessed email stored on a server, that copy is no longer ‘incident to transmission’ nor a backup copy of the file that is incident to transmission; rather, it is just in remote storage like any other file held by an RCS.”). But see *Theofel v. Farey-Jones*, 359 F.3d 1066, 1075 (9<sup>th</sup> Cir. 2004) (holding that emails stored on an ISP's server following delivery are usually stored for backup protection, thereby making the more stringent ECS rules applicable).

<sup>83</sup> See *supra* notes 75 through 77 and accompanying text.

<sup>84</sup> See *supra* Section II.B.

communications privilege applies to letters discovered by third parties, then it follows that the privilege should apply to Web-based emails accessed by ISPs in response to a court order, subpoena or search warrant. Unfortunately, the case law almost universally states that where the contents of a letter between spouses are discovered by a third party, the marital communications privilege does not apply.

For example, in the case State of Kansas v. Myers,<sup>85</sup> defendant Myers was convicted of voluntary manslaughter, aggravated robbery and arson.<sup>86</sup> On appeal, Myers argued that the trial court erred in admitting into evidence letters he had written to his wife. The letters contained very damaging admissions of Myers' role in the alleged crimes.<sup>87</sup> The state offered the letters into evidence, not through Myers' wife, but through Cassity, a friend of Myers.<sup>88</sup> Myers' wife had lived in Cassity's basement for a period of time. Three months after she moved out, Cassity found the letters under a mattress and turned them over to law enforcement officers.<sup>89</sup>

The Kansas Supreme Court held that the trial court did not err in allowing the letters into evidence.<sup>90</sup> The court reasoned that the letters had fallen into Cassity's hands inadvertently and without the connivance of Myers' wife.<sup>91</sup> Therefore, the purpose of the marital privilege, to protect the confidential relationship between spouses, would not be thwarted if a third person acquires the communication and discloses it.<sup>92</sup> The court also found that construing the marital communications privilege narrowly would ensure that relevant facts are available to the court unless very specific exceptions apply.<sup>93</sup>

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<sup>85</sup> 640 P.2d 1245 (Kan. 1982).

<sup>86</sup> Id. at 1246.

<sup>87</sup> Id.

<sup>88</sup> Id.

<sup>89</sup> Id.

<sup>90</sup> 640 P.2d at 1248.

<sup>91</sup> Id.

<sup>92</sup> Id. at 1248-49.

<sup>93</sup> Id.

The result in Myers is not unusual. In State v. Szemple,<sup>94</sup> the New Jersey Supreme Court considered a similar factual situation. Defendant Szemple, charged with first-degree murder, wrote a letter to his wife while he awaited trial.<sup>95</sup> The letter contained a description of a murder he had committed. Defendant's wife had the letter in her possession when she and her father moved her belongings from one residence to another.<sup>96</sup> During the move, the wife's father discovered the letter and stuck it in his shirt. After reviewing the letter, he turned it over to the prosecutor on the case.<sup>97</sup> The trial court allowed the letter into evidence despite Szemple's objection on the basis of the marital communications privilege.<sup>98</sup>

In finding that the letter was not protected by the marital communications privilege, the Szemple court noted that the privilege should be construed narrowly "as its only effect [is] the suppression of relevant evidence . . . ."<sup>99</sup> This approach to the evidentiary privileges, according to the court, justifies the third party presence rule.<sup>100</sup> The court reasoned that the privilege does not attach to the communication but to the spouses.<sup>101</sup> Accordingly, no privilege is violated if the letter ends up in the hands of a third party outside the marriage.<sup>102</sup> 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".<sup>103</sup>

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<sup>94</sup> 640 A.2d 817 (N.J. 1994).

<sup>95</sup> Id. at 819.

<sup>96</sup> Id.

<sup>97</sup> Id. at 819-20.

<sup>98</sup> Id. at 820.

<sup>99</sup> 640 A.2d at 821.

<sup>100</sup> Id.

<sup>101</sup> Id. at 822.

<sup>102</sup> Id.

<sup>103</sup> Id. at 824. According to the Szemple court, "To 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.

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, an Alabama Court of Appeals held that the privilege did not apply to defendant's suicide note to her husband where it was found on the floor by police officers answering a 911 call.<sup>104</sup> The court reasoned that the privilege cannot "protect against the testimony of third parties who have secured possession or learned the contents" of the communication.<sup>105</sup> In Metcalf v. State, where the defendant wrote a letter to his wife from jail, placed it in an unsealed envelope, and requested that a soon-to-be-released inmate deliver it, 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.<sup>106</sup> In Commonwealth v. May, 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.<sup>107</sup> The facts of May are particularly analogous to one's use of Web-based email. 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.<sup>108</sup> Similar to the defendant in May, a user of Web-based email signs an agreement granting the ISP the right to review incoming and outgoing messages.<sup>109</sup> Thus, it follows that a court would find that a user of Web-based email has no viable claim of confidentiality in messages sent via the Internet. Finally, the facts of Wolfe v. U.S.<sup>110</sup> are applicable here. As stated earlier, Wolfe

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<sup>104</sup> 570 So.2d 744, 759 (1990).

<sup>105</sup> Id. (internal quotations omitted).

<sup>106</sup> 681 S.W.2d 344, 347 (1984).

<sup>107</sup> 656 A.2d 1335, 1342 (1995).

<sup>108</sup> Id.

<sup>109</sup> See supra Section II.A.

<sup>110</sup> 291 U.S. 7 (1934).

involved a defendant who wrote a letter to his wife via his personal stenographer.<sup>111</sup> The U.S. Supreme Court held that the defendant's decision to involve his stenographer in the communication prevented the privilege from attaching.<sup>112</sup>

Most of the scenarios mentioned above involve the inadvertent and sometimes careless disclosure of confidential communications to a third party by one or both of the spouses. Additionally, some of the scenarios involve the intentional disclosure to the third party on the part of the communicating spouse.<sup>113</sup> A comparison of letters to Web-based emails makes sense regardless of whether the disclosure to the third party is inadvertent or intentional. It is clear that even if a third party intentionally seeks to discover the content of the communication, no violation of the privilege will occur. If the writer of a Web-based email fails to protect it by intentionally or inadvertently disclosing it to the ISP, then the case law regarding applicability of the privilege to letters indicates that the privilege would never apply to Web-based email considering that disclosure of the communication is necessary for a writer to successfully send an email 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 email 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

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<sup>111</sup> Id. at 13.

<sup>112</sup> Id. at 17.

<sup>113</sup> Recall that intentional disclosure on the part of the recipient-spouse typically will not destroy the privilege. See supra notes 22 through 23 and accompanying text.

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,<sup>114</sup> The Florida Supreme Court considered the following facts: Defendant Proffitt was convicted of murder in the first degree.<sup>115</sup> At trial, the prosecution offered into evidence an oral conversation between Proffitt and his wife wherein Proffitt confessed that he had killed a man.<sup>116</sup> The state offered evidence of the conversation through the testimony of Mrs. Bassett, a woman who was renting a room next to Proffitt's room in a two-bedroom mobile home.<sup>117</sup> Although Bassett was not in Proffitt's room during the conversation, she was able to hear certain segments of the conversation.<sup>118</sup>

In holding that the conversation was not privileged, the court found that the Proffitts knew or should have known that there was a possibility that their conversation was being overheard.<sup>119</sup> The court noted that the Proffitts must have realized that Ms. Bassett was in the next room because she made rental payments to them each month.<sup>120</sup> Additionally, the court found that the Proffitts did not attempt to keep their voices low because Ms. Bassett heard their conversation despite her door being closed.<sup>121</sup> These facts, in the court's opinion, demonstrated that the Proffitts failed to take steps to protect the confidentiality of their conversation.<sup>122</sup>

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<sup>114</sup> 315 So.2d 461 (Fla. 1975), aff'd 428 U.S. 242 (1976).

<sup>115</sup> Id. at 463.

<sup>116</sup> Id.

<sup>117</sup> Id.

<sup>118</sup> Id.

<sup>119</sup> 315 So.2d at 465.

<sup>120</sup> Id.

<sup>121</sup> Id.

<sup>122</sup> Id. Accord Nash v. Fidelity-Phenix Fire Ins. Co., 146 S.E. 726, 727 (W. Va. 1929) (conversation between spouses overheard by boarder not privileged). See also State v. Summerlin, 675 P.2d 686, 695 (Ariz. 1984) (holding that conversations between defendant and his wife while police officers were present were not privileged communications).

A conversation overheard by a third party will remain unprivileged even if the third party intentionally eavesdrops on the conversation. Consider Horn v. State,<sup>123</sup> where defendant Horn was convicted of second degree murder.<sup>124</sup> 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 between Horn and his wife while his wife was at work.<sup>125</sup> 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.<sup>126</sup> Walker testified that she eavesdropped on the conversation because she was "being nosey".<sup>127</sup>

On appeal, Horn asserted that the trial court erred in admitting Walker's testimony because the conversation was protected by the marital communications privilege.<sup>128</sup> 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".<sup>129</sup> Thus, the conversation between Horn and his wife was not protected by the privilege.<sup>130</sup> This approach to eavesdropping by third parties is consistent with a very narrow application of the privilege.<sup>131</sup>

Likewise, case law indicates that recorded conversations are not privileged where a third party gains access to the recording. In Wong-Wing v. State,<sup>132</sup> the defendant was charged with

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<sup>123</sup>298 So.2d 194 (Fla. Dist. Ct. App. 1974).

<sup>124</sup>Id. at 195.

<sup>125</sup>Id.

<sup>126</sup>Id. at 195-96.

<sup>127</sup>Id.

<sup>128</sup>298 So.2d at 196.

<sup>129</sup>Id. at 196 (quoting 63 A.L.R. 107, 108-09).

<sup>130</sup>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.

<sup>131</sup> 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.").

<sup>132</sup> 847 A.2d 1206 (Md. Ct. Spec. App. 2004).

several counts of child sexual abuse.<sup>133</sup> The state offered into evidence the transcript and recording of a message the defendant had left his wife on her answering machine.<sup>134</sup> The defendant objected on the basis of the spousal privilege.<sup>135</sup> 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 that his wife shared with her daughter and mother.<sup>136</sup> According to the court, “when appellant left the message on the answering machine, he ran the risk that someone other than [defendant’s wife] would retrieve the message.”<sup>137</sup>

The analogy between oral conversations and Web-based email 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 email has failed to take precautions to prevent a third party from accessing the message. The writer deposits the email 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 emails based on the application of the privilege to oral conversations.

### **C. The Effect of Email on Applicability of the Professional Privileges**

It is 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 email might have on their applicability is

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<sup>133</sup> Id. at 1208.

<sup>134</sup> Id. at 1210.

<sup>135</sup> Id.

<sup>136</sup> Id. at 1213.

<sup>137</sup> 847 A.2d at 1213.

virtually non-existent. However, much commentary and a few court opinions have addressed whether the use of email vitiates the attorney-client privilege. Before discussing whether it is appropriate to draw an analogy between the marital communications privilege and the professional privileges, this article will explore what effect the use of email has on the application of the attorney-client privilege.

*1. Email and the Attorney-Client Privilege*

The attorney-client privilege, according to the U.S. Supreme Court, is “the oldest of the privileges for confidential communications known to the common law.”<sup>138</sup> 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.”<sup>139</sup> Some nuances of the attorney-client privilege vary depending on jurisdiction, but the general legal principles of the privilege state that it arises:

- (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 instant permanently protected,
- (7) From disclosure by himself or by the legal adviser,
- (8) Except the protection be waived.<sup>140</sup>

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<sup>138</sup> Upjohn v. United States, 449 U.S. 383, 389 (1981) (citing 8 Wigmore EVIDENCE § 2290 (McNaughton rev. 1961)).

<sup>139</sup> Swidler & Berlin v. United States, 524 U.S. 399, 403 (1988).

<sup>140</sup> Wigmore, supra note 22, § 2292.

Under federal law, “[a] client has a privilege to refuse to disclose and prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.”<sup>141</sup>

Several legal commentators and some court opinions have addressed whether the use of email, by its nature, will result in waiver of the attorney client privilege. In In re Asia Global Crossing, Ltd.,<sup>142</sup> 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 they communicated with the attorneys via the corporate email system.<sup>143</sup> Apparently, the emails concerned potential disputes between the officers and the debtor-corporation.<sup>144</sup> The debtor-corporation’s bankruptcy Trustee claimed that the communications, which were stored on the debtor-corporation’s email servers, were not privileged simply due to the fact that they were sent by way of email, which carries an inherent risk of unauthorized disclosure.<sup>145</sup> The court found that, although email carries some risk of unauthorized disclosure, the prevailing view is that communication through email offers a reasonable expectation of privacy.<sup>146</sup> Therefore, according to the court, a client’s decision to communicate with her attorney via email does not, without more, constitute waiver of the privilege.<sup>147</sup>

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<sup>141</sup> Proposed Fed. R. Evid. 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 (6<sup>th</sup> 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.” (internal quotations omitted)).

<sup>142</sup> 322 B.R. 247 (Bankr. S.D.N.Y. 2005).

<sup>143</sup> Id. at 253.

<sup>144</sup> Id. at 256.

<sup>145</sup> Id. at 252, 256

<sup>146</sup> Id. at 256.

<sup>147</sup> 322 B.R. at 256.

The Supreme Court of Nevada made an identical ruling in City of Reno v. Reno Police Protective Association.<sup>148</sup> In City of Reno, a union organization sued the City of Reno, claiming unfair labor practices.<sup>149</sup> The state labor relations board admitted into evidence a document authored by the City's labor relations manager and sent, as an email attachment, to the City's attorney.<sup>150</sup> The City claimed that the attorney-client privilege applied to the document, but the union organization argued that documents sent by email cannot be protected by the attorney-client privilege.<sup>151</sup> The Nevada Supreme Court disagreed, finding that "a document transmitted by email is protected by the attorney-client privilege as long as the requirements of the privilege are met."<sup>152</sup>

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 email does not violate a lawyer's ethical obligation to maintain client confidentiality.<sup>153</sup> Both opinions cited ABA Formal Opinion 99-413, issued in March 1999.<sup>154</sup> Although the ABA opinion deals with client confidentiality under the Model Rules of Professional Conduct,<sup>155</sup> some legal commentators and court opinions have cited the ABA Opinion as persuasive authority on the issue of whether the mere use of unencrypted email

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<sup>148</sup> 59 P.3d 1212 (Nev. 2003).

<sup>149</sup> Id. at 1214.

<sup>150</sup> Id. at 1215.

<sup>151</sup> Id. at 1218.

<sup>152</sup> 59 P.3d at 1218.

<sup>153</sup> See In re: Asian Global Crossing, 322 B.R. at 256 (citing ABCNY Formal Op. 2000-1, 2000 WL 704689 (Jan. 2000); ABA Formal Ethics Op. 99-413 (March 10, 1999); NYSBA Eth. Op. 709, 1998 WL 957924 (Sept. 16, 1998)). See also City of Reno, 59 P.3d at 1218 (citing ABA Formal Ethics Op. 99-413). 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, Student Note, Does Unencrypted E-Mail Protect Client Confidentiality?, 27 Am. J. Trial Advoc. 623, 624 (2004).

<sup>154</sup> See supra note 153.

<sup>155</sup> Model Rule 1.6 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 RULE OF PROF'L CONDUCT R. 1.6.

vitiates the attorney-client privilege.<sup>156</sup> While acknowledging that email communications have some inherent security problems, the ABA Opinion found that email “poses no greater risk of interception or disclosure than other modes of communication commonly relied upon as having a reasonable expectation of privacy.”<sup>157</sup> The ABA’s blanket statement that all email transmissions afford a reasonable expectation of privacy is nothing less than a gross generalization.<sup>158</sup> However, the ABA and state bar associations<sup>159</sup> have likely found a reasonable expectation of privacy to exist so that attorneys will not be forced to purchase expensive encryption software or completely discontinue the use of email to communicate with clients.<sup>160</sup>

Despite some problems with reasoning behind the ABA Opinion, it is clear that state bar associations and some courts have relied upon the ABA Opinion in finding that the use of

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<sup>156</sup> See *supra* note 153 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 (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. 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 applies to all information related to the representation, whether obtained from the client or through the attorney’s independent investigation . . . .” *Id.*

<sup>157</sup> ABA Opinion, *supra* note 153.

<sup>158</sup> See *supra* Section II.B. The ABA also stated in its opinion that the ECPA provides adequate protection for emails accessed by third parties; however, as this article demonstrates, the ECPA does not provide a great deal of protection to emails stored on ISP servers. See *supra* Section II.C.

<sup>159</sup> Several state bar associations have opined that the use of unencrypted email does not violate an attorney’s ethical duty to protect client confidences. See Alaska Eth. Op. 98-2 (1998); Ariz. Eth. Op. 97-04 (1997); Ariz. Eth. Op. 02-04 (2002); Colo. Eth. Op. 90 (1992); Conn. Bar Ass’n, Informal Op. 99- 52 (1999); Del. Eth. Op. 2001-2 (2001); D.C. Eth. Op. 281 (1998); Haw. Discp. Counsel, Informal Op. 40 (2001); Ill. Bar Ass’n Advisory Op. 96-10 (1997); Iowa Comm. of Prof. Ethics & Conduct, Op. 97-01 (1997); Iowa Comm. of Prof. Ethics & Conduct, Op. 96-33 (1997); Ky. Eth. Op. E-403 (1998); Ky. Formal & Informal Op., Isba Op. No. 96-10 (1997); Md. Eth. Op. 92-19 (1992); Mass. Eth. Op. 00-1 (2000); Minn. Eth. Op. 19 (1999); Mo. Eth., Informal Op. 990007; N.Y. Comm. Prof. & Judicial Eth., Formal Op. 1998-2 (1998); N.C. Eth. Op. RPC 215 (1995); N.D. Eth. Op. 97-09 (1997); Ohio Eth. Op. 99-2 (1999); Pa. Eth. Op. 97- 130 (1997); S.C. Eth. Op. 97-08 (1997); Tenn. Prof. Respon. Bd., Advisory Op. 98-A-650(a) (1998); Utah Eth. Op. 00-01 (2000); Vt. Eth. Op. 97-5 (1997).

<sup>160</sup> 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 email 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 email usage in the legal profession. See Messer, *supra* note 156, at 75 (citing a 2003 technology survey that revealed that 80 percent of attorneys use email one or more times a day and that 96 percent of those lawyers use email for correspondence with clients and colleagues).

unencrypted email 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, then the use of Web-based email would not endanger the privilege. Next, this article will explore 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 possess some similarities and some differences when compared to the marital communications privilege. The general principles of the attorney-client privilege have already been discussed.<sup>161</sup> The physician-patient privilege protects from disclosure confidential communications made by a patient to his physician for the purpose of medical treatment.<sup>162</sup> 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.”<sup>163</sup>

It must be noted that the federal courts do not recognize a physician-patient privilege.<sup>164</sup> Indeed, in its proposed codification of the evidentiary privileges in 1973, the Judicial Conference Advisory Committee on the Rules of Evidence conspicuously left out any rule of privilege protecting the physician-patient relationship.<sup>165</sup> The Committee reasoned that a general physician-patient privilege was unnecessary so long as a psychotherapist-patient privilege was

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<sup>161</sup> See *supra* Section III.C.1.

<sup>162</sup> See, e.g., Colo. Rev. Stat. § 13-90-107(1) (d); Ind. Code Ann. § 34-1-14-5; Minn. Stat. § 595.92; N.Y. C.P.L.R. § 4504(a).

<sup>163</sup> *State v. Gillespie*, 710 N.W.2d 289, 297 (Minn. Ct. App. 2006).

<sup>164</sup> 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 (7<sup>th</sup> Cir. 1995) (“Unfortunately for [plaintiff], federal common law does not recognize a physician-patient privilege.”).

<sup>165</sup> See Proposed Fed. R. of Evid. 504.

codified.<sup>166</sup> The U.S. Supreme Court apparently agrees with this position. While it has found that the existence of the psychotherapist-patient privilege is necessary for proper diagnosis and treatment,<sup>167</sup> the Court has stated that “treatment 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.”<sup>168</sup>

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 where such communications assist the professional in making a complete diagnosis.<sup>169</sup> The purpose of the privilege, according to the California legislature, is as follows:

“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 . . . depends.”<sup>170</sup>

Finally, the clergy-communicant<sup>171</sup> privilege protects communications made to a member of the clergy during the course of spiritual counseling or advice.<sup>172</sup> Similar to the purposes of the

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<sup>166</sup> Id.

<sup>167</sup> Jaffee v. Redmond, 518 U.S. 1, 15 (1996).

<sup>168</sup> Id. at 10.

<sup>169</sup> See, e.g., Cal. Evid. Code § 1012; Iowa Code Ann. § 622.10; Me. Rev. Stat. tit. 32 §§ 7005, 13862; Minn. Stat. § 595.02; Wash. Rev. Code § 18.83.110.

<sup>170</sup> California Sen. Judiciary Com., 29B West’s Ann. Evid. Code (1995 ed.) § 1014 at 333 (quoted in San Diego Trolley, Inc. v. Superior Court, 105 Cal.Rptr.2d 476, 480 (Cal. Ct. App. 2001)).

<sup>171</sup> 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 to communications between clergy and communicants of other denominations. In re: Grand Jury Investigation, 918 F.2d 374, 385 (3d Cir. 1990).

other professional privileges, the purpose of the clergy-communicant privilege is to encourage the exercise of religious duty and assist the clergy member in performing his or her counseling duties.<sup>173</sup>

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. 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,<sup>174</sup> 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.<sup>175</sup> The confidential communications aspect of the privilege was not officially recognized until 1934, many years after Supreme Court recognized the testimonial aspect of the privilege.<sup>176</sup> At least one commentator has noted that, due to the different origins of the marital privilege, case law regarding the marital communications privilege is unhelpful in predicting how a court would rule on the other privileges.<sup>177</sup>

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

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<sup>172</sup>Fla. Stat. Ann. § 90.505; 735 Ill. Comp. Stat. Ann. 5/8-803; Wash. Rev. Code § 5.60.060(3). See also In re Grand Jury Investigation, 918 F.2d at 384 (finding that the privilege exists at federal common law).

<sup>173</sup>State v. Potter, 478 S.E.2d 742, 755 (W.Va. 1996).

<sup>174</sup>See supra Section III.C.2.

<sup>175</sup>See supra note 8 and accompanying text.

<sup>176</sup>See supra note 11 and accompanying text.

<sup>177</sup>Hundley, supra note 4, at 265, n.9.

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.<sup>178</sup> 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.<sup>179</sup> 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.<sup>180</sup> 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."<sup>181</sup> For example, in Rosati v. Kuzman,<sup>182</sup> 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.<sup>183</sup> Noting the parents' "vital" role as the child's confidants, the court found that the child reasonably and unequivocally intended that the conversations remain

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<sup>178</sup> See supra text accompanying notes 14 through 22.

<sup>179</sup> See, e.g., Clagett v. Commonwealth, 472 S.E.2d 263, 270 (Va. 1996) (finding unprivileged a conversation between attorney and defendant in the hallway outside a courtroom where the state's forensic expert overheard the conversation and reported its details to the prosecutor).

<sup>180</sup> See, e.g., PSE Consulting v. Frank Mercede and Sons, Inc., 838 A.2d 135, 167 n.28 (Conn. 2004) ("We have recognized, however, that the 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.") (internal quotations omitted); State v. Soto, 933 P.2d 66, 77 (Haw. 1997) (holding that the key to determining whether the presence of a third party waives the privilege will turn on whether client and attorney "knew of should have known that there was no reasonable expectation of confidentiality" due to the presence of the third party); 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, 615 S.E.2d 465, 483 (S.C. Ct. App. 2005) ("The privilege may extend to agents of the attorney.").

<sup>181</sup> Newman, 863 A.2d at 333 (internal quotations omitted).

<sup>182</sup> 660 A.2d 263 (R.I. 1995).

<sup>183</sup> Id. at 267.

confidential.<sup>184</sup> Indeed, even where 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 where the third party is serving as a translator or interpreter in order to facilitate the communication between attorney and client.<sup>185</sup>

Likewise, the physician-patient privilege generally will not attach where a third party is present.<sup>186</sup> However, the privilege does apply where the third party is present to "aid physicians or transmit information to physicians on behalf of patients."<sup>187</sup> Additionally, where 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.<sup>188</sup> For example, where a police officer escorted defendant to the hospital following a car accident, it was held that communications between the defendant and his nurse while in the presence of the officer were privileged.<sup>189</sup>

In the context of the psychotherapist-patient privilege, the presence of a third party generally will prevent application of the privilege.<sup>190</sup> However, where two patients are participating in a joint counseling session, the privilege will attach.<sup>191</sup> Additionally, the third party presence rule works almost identically to the third party presence rule in the context of the

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<sup>184</sup> Id.

<sup>185</sup> See People v. Osorio, 549 N.E.2d at 1185-86.

<sup>186</sup> People v. Covington, 19 P.3d 15, 20 (Colo. 2001)

<sup>187</sup> Darnell v. State, 674 N.E.2d 19, 21 (Ind. Ct. App. 1996). 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.")

<sup>188</sup> See, e.g., People v. Jaffarian, 799 N.Y.S.2d 733, 735 (N.Y. Just. Ct. 2005).

<sup>189</sup> Id.

<sup>190</sup> See Redding v. Virginia Mason Medical Center, 878 P.2d 483, 485 (Wash. Ct. App. 1994). Accord State v. Branch-Wear, 695 A.2d 1169, 1174 (Me. 1997).

<sup>191</sup> Id. at 486. Accord City of Cedar Falls v. Cedar Falls Community School District, 617 N.W.2d 11, 22 (Iowa 2000).

physician-patient privilege. Each of the privileges will attach where the third party is a necessary and customary participant in the consultation or treatment of the patient.<sup>192</sup>

Even in the context of the clergy-communicant privilege, which traditionally applied to a penitent's private confessions to his priest,<sup>193</sup> 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.<sup>194</sup> For example, where a member of the clergy had a group discussion with five unrelated persons, the privilege would still apply if all parties present were essential to the facilitation of the communication.<sup>195</sup> In determining whether a third party is essential to and furtherance of the communication, the Third Circuit Court of Appeals 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.<sup>196</sup>

Only in the context of the marital communications privilege do courts apply the third party presence rule virtually without exception.<sup>197</sup> Several explanations exist for the difference in treatment. First, because the marital privilege originated from society's distaste for requiring

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<sup>192</sup> See *supra* note 187 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).

<sup>193</sup> *In re Grand Jury Investigation*, 918 F.2d 374, 386 (3d. Cir. 1990)

<sup>194</sup> *Id.* *Accord People v. Campobello*, 810 N.E.2d 307, 321 (Ill. Ct. App. 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." (internal quotations omitted)).

<sup>195</sup> *In re Grand Jury Investigation*, 918 F.2d at 386.

<sup>196</sup> *Id.* at 387. The Third Circuit noted that delving into the pastoral counseling practices of a particular denomination poses no First Amendment problem. Rather, "we believe that establishing the pastoral 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 378 n.21.

<sup>197</sup> See *supra* Sections III.A and III.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 year-old sons).

one spouse to betray the other,<sup>198</sup> society may be less concerned if a third party is able disclose the communication without the assistance or connivance of the recipient-spouse.<sup>199</sup>

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,<sup>200</sup> the Indiana Supreme Court found that the marital communications privilege does not apply as broadly as the professional privileges, in part because the privilege's primary purpose is not to promote disclosure between the parties.<sup>201</sup> The court noted that the existence of the professional privileges facilitates open communication between the professionals and their clients.<sup>202</sup> The marital communications privilege, on the other hand, exists to ensure the health of marriages and prevent marital conflict.<sup>203</sup> 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."<sup>204</sup> 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.

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<sup>198</sup> See supra notes 8 and 12. 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.").

<sup>199</sup> See Hundley, supra note 4, at 265, n.9 (stating that courts likely enforce 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 other than the wife testifies regarding the communication).

<sup>200</sup> 836 N.E.2d 414 (Ind. 2005).

<sup>201</sup> Id. at 421-22.

<sup>202</sup> Id. at 421.

<sup>203</sup> Id.

<sup>204</sup> Id. But see Ulibarri v. Gerstenberger, 909 P.2d 449 (Ariz. 1995). In Ulibarri, the Arizona Court of Appeals noted that professional communications have as an additional source of protection – namely, the ethical and disciplinary rules of each profession. Id. at 454. The court held 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. 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.

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 professional,<sup>205</sup> comfort the layperson,<sup>206</sup> comply with the requirements of the law,<sup>207</sup> or further the communication itself,<sup>208</sup> each of the professional privileges will attach because the third party's presence is necessary. As the U.S. 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."<sup>209</sup> In the context of the marital communications privilege, on the other hand, it is understood, as the Wolfe court noted, that husband and wife may communicate confidentially and effectively without the aid of a third party.<sup>210</sup> Thus, while an interpreter's presence during a communication between attorney and client did not destroy the privilege,<sup>211</sup> a letter sent from a husband to his wife was not privileged where the wife had difficulty reading and sought assistance from a third party to understand the content of the letter.<sup>212</sup>

The focus on necessity suggests that the marital communications privilege should not apply to spousal communications sent via Web-based email. Certainly there are other avenues for spousal communication that do not require the involvement of third parties. While communication by way of email may be necessary for the arms-length relationship between

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<sup>205</sup> See supra notes 180 and 187 and accompanying text.

<sup>206</sup> See supra note 184 and accompanying text.

<sup>207</sup> See supra note 188 and accompanying text.

<sup>208</sup> See supra notes 185, 191 and 194 and accompanying text.

<sup>209</sup> 291 U.S. at 16.

<sup>210</sup> Id. at 16-17.

<sup>211</sup> See supra note 185 and accompanying text.

<sup>212</sup> Grukley v. U.S., 394 F.2d 244, 246 (8<sup>th</sup> Cir. 1968).

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 email 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. Title I of the ECPA states: “No 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.”<sup>213</sup> While it may appear that this statute settles the question of whether emails obtained by law enforcement will retain their privileged status, this section of the ECPA specifically applies to Title I of the Act and not the Stored Communications Act, which is found in Title II of the Act.<sup>214</sup>

Additionally, a New York statute states the following: “No communication privileged under this article shall lose its privileged nature 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.”<sup>215</sup> California has enacted a statute with virtually identical language.<sup>216</sup>

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 the all evidentiary privileges despite disclosure

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<sup>213</sup> 18 U.S.C. § 2517(4).

<sup>214</sup> See David Hricik, *Lawyers Worry Too Much About Transmitting Client Confidences by Internet E-Mail*, 11 *Geo. J. Legal Ethics* 459, 76 (1998) (stating that Section 2517(4) does not apply to stored communications).

<sup>215</sup> C.P.L.R. § 4548 (McKinney 2006).

<sup>216</sup> See West’s Ann. Cal. Evid. Code § 917(b) (West 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.”).

through Web-based email fail to address the issue of whether the marital privilege should apply to Web-based emails. 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 email 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, the next Section of the article will address abrogation of the marital communications privilege.

#### **IV. 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.<sup>217</sup> 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.<sup>218</sup> In determining the viability of the evidentiary privileges, legal scholars recognize at least two approaches. This portion of the article will apply each approach to the marital communications privilege in order to determine whether the privilege should continue to exist.

##### **A. The Utilitarian Approach**

Dean Wigmore created the utilitarian, sometimes known as “instrumental”, approach.<sup>219</sup> Wigmore fashioned the approach as a new framework by which courts could analyze new privileges and re-visit existing privileges.<sup>220</sup> According to Wigmore’s approach, four conditions are necessary before a court may recognize an evidentiary privilege:

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<sup>217</sup> See *supra* text accompanying note 12.

<sup>218</sup> See *supra* notes 24 through 31 and accompanying text.

<sup>219</sup> Edward J. Imwinkelried, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 3.2.3 (2002).

<sup>220</sup> *Id.*

- (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 disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.<sup>221</sup>

Under Wigmore's approach, unless each of the four criteria is satisfied, then no privilege can exist.<sup>222</sup> 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.<sup>223</sup> Wigmore's approach has been widely accepted by the courts as the framework that should be used to determine whether the creation of a new privilege is warranted.<sup>224</sup> 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

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<sup>221</sup> Wigmore, *supra* note 22, § 2285 at 527-28.

<sup>222</sup> *Id.*

<sup>223</sup> Imwinkelried, *supra* note 219, at 131.

<sup>224</sup> See, e.g., *In re Grand Jury Investigation*, 103 F.3d 1140, 1152 (3d. 1997); *In re Doe*, 711 F.2d 1187, 1193 (2d. Cir. 1983); *American Civil Liberties Union of Mississippi v. Finch*, 638 F.2d 1336, 1344 (5<sup>th</sup> Cir. 1981); *Caesar v. Mountanos*, 542 F.2d 1064, 1068 n.10 (9<sup>th</sup> Cir. 1976).

a Web-based email to the recipient spouse, with 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, factor one would be established even if the communicating spouse disclosed confidential information via Web-based email.

Wigmore's second criterion 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, it must be shown that, absent the privilege, a similarly situated person would be deterred from disclosing the confidential information.<sup>225</sup>

Wigmore created the second criterion on a theory that any privilege satisfying this criterion 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."<sup>226</sup> The U.S. Supreme Court agrees with this approach. In Swidler & Berlin v. U.S.,<sup>227</sup> a case involving the attorney-client privilege, the Court noted that clients would

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<sup>225</sup> Imwinkelried, *supra* note 219, at 132. See also Fisher v. U.S., 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.").

<sup>226</sup> Imwinkelried, *supra* note 219, § 3.2.3 at 135. See also Melanie B. Leslie, The Costs of Confidentiality and the Purpose of Privilege, 2000 Wis. L. Rev. 31, 31 ("In a perfect [Wigmorean] world, the privilege would shield no evidence. Privilege generates the communication that the privilege protects.").

<sup>227</sup> 524 U.S. 399 (1998)

probably not share confidential information with their attorneys in the absence of the privilege, thereby making “the loss of evidence [ ] more apparent than real.”<sup>228</sup>

Many commentators have argued that the marital communications privilege fails Wigmore’s second criterion because most spouses do not confide in each other due to the existence of the marital communications privilege.<sup>229</sup> Rather, spouses confide in each other due to the trust and affection present in the relationship.<sup>230</sup> As one commentator notes:

[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[s] in daily life the degree of fullness of marital disclosures.<sup>231</sup>

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

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<sup>228</sup> *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.”).

<sup>229</sup> See, e.g., DePrez, *supra* note 12, 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.”).

<sup>230</sup> *Id.*

<sup>231</sup> McCormick, *supra* note 26, § 86 at 383-84.

laypersons.<sup>232</sup> Apparently, Wigmore agreed with this analysis, arguing that no persuasive data showed that the recognition of the privilege is necessary to facilitate communications between spouses.<sup>233</sup> Therefore, with regard to Wigmore's second criterion, "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."<sup>234</sup>

Wigmore's third criterion requires that the advocate of the privilege 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.<sup>235</sup>

The U.S. 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."<sup>236</sup> Indeed, the Court has described the marital relationship as the most important relationship in life.<sup>237</sup> The U.S. Supreme Court has also recognized society's interest in the protecting the privacy of the marital relationship. In Griswold v. Connecticut,<sup>238</sup> the Court stated that it found "repulsive" the idea of allowing the government to search "the sacred precincts of the marital bedroom".<sup>239</sup> Considering the value that the High

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<sup>232</sup> Robert M. Hutchins & Donald Slesinger, Some Observations on the Law of Evidence: Family Relations, 13 Minn. L. Rev. 675, 682 (1929).

<sup>233</sup> Wigmore, supra note 22, § 2332, at 643-44.

<sup>234</sup> McCormick, supra note 26, § 86, at 384.

<sup>235</sup> Imwinkelried, supra note 219, § 3.2.3 at 134.

<sup>236</sup> Maynard v. Hill, 125 U.S. 190, 211 (1888).

<sup>237</sup> Id. at 205.

<sup>238</sup> 381 U.S. 479 (1965).

<sup>239</sup> 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 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."

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

Wigmore's final criterion requires proof that the injury to the relationship which would result from disclosure of the communication is greater than the benefit gained from disclosure of the communication. The analysis of Wigmore's second criterion is important in the analysis of the fourth criterion. If, as the second criterion requires, the existence of the privilege is essential to the proper functioning of the relationship that is to be protected, then it follows that 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 criteria 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.<sup>240</sup> Specifically, Wigmore felt that evidentiary privileges should be recognized only where they are "a necessary means of promoting a valuable, confidential social relation."<sup>241</sup> 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 the courts, it is not without its critics. Indeed, Wigmore himself questioned whether the utilitarian model would support the

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<sup>240</sup> Imwinkelried, supra note 219, § 5.1.1 at 257.

<sup>241</sup> Id.

case for a spousal privilege.<sup>242</sup> However, rather than arguing for abrogation of the marital communications privilege, it has been 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.<sup>243</sup> The U.S. Supreme Court has recognized that the constitutional right to privacy may protect "the individual interest in avoiding the disclosure of personal matters" as well as "the interest in independence in making certain kinds of important decisions."<sup>244</sup> 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.

### *1. The Informational Privacy Approach*

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

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<sup>242</sup> Wigmore, *supra* note 22, § 2333.

<sup>243</sup> Imwinkelried, *supra* note 219, § 5.1.2 at 259.

<sup>244</sup> *Whalen v. Roe*, 429 U.S. 489, 599-600 (1977). It has been argued 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 (6<sup>th</sup> Cir. 1999) (holding 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 Electric Corp.*, 638 F.2d 570, 577-580 (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). Accord *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir.1983); *Hawaii Psychiatric Soc'y Dist. Branch 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 . . .").

denying a privilege is a loss of informational privacy.”<sup>245</sup> 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.<sup>246</sup>

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. 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,<sup>247</sup> Professor Black drafted a letter to a Congressperson in 1973.<sup>248</sup> 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 of anybody’s lawsuit for breach of a contract to sell a carload of apples. . . . It

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<sup>245</sup> Imwinkelried, supra note 219, § 5.3.2 at 304.

<sup>246</sup> Kenneth S. Broun, Giving Codification a Second Chance – Testimonial Privileges and the Federal Rules of Evidence, 53 Hastings L.J. 769, 795 (2002). But see Imwinkelried, supra note 219, § 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.”).

<sup>247</sup> See supra notes 29 through 31 and accompanying text.

<sup>248</sup> Charles L. Black, The Marital and Physician Privileges – A Reprint of a Letter to a Congressman, 1975 Duke L.J. 45.

seems clear to me that this Rule trenches on the area of marital privacy so staunchly defended by the Supreme Court . . . .<sup>249</sup>

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 Approach*

A second rationale for the humanistic approach is the concept of individual autonomy or decisional privacy.<sup>250</sup> Under this rationale, the evidentiary privileges should exist to help a person “effectively exercise autonomy by facilitating *intelligent, independent* life preference choices.”<sup>251</sup> The existence of certain evidentiary privileges will arguably promote autonomy by allowing individuals the ability to freely consult confidants about “fundamental life choices” without fear of government intrusion.<sup>252</sup> Thus, if a particular evidentiary privilege promotes such free-flowing communication, then the humanistic approach supports its existence. For example, it has been 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 between the attorney and client is frank and encourages individuals to explore their legal options with an advisor.”<sup>253</sup>

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<sup>249</sup> *Id.* at 48.

<sup>250</sup> Imwinkelried, *supra* note 219, § 5.3.3 at 308.

<sup>251</sup> *Id.* at 327 (emphasis in original).

<sup>252</sup> *Id.*

<sup>253</sup> 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) (citing Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060, 1073 (1976)). See also Steven Goode, *Identity, Fees and the*

In order to determine if a particular privilege will facilitate intelligent, independent choices, the proponents of the individual autonomy approach have created a three-factor test.

According to the test, courts must determine:

- (1) whether 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 choice.<sup>254</sup>

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 this first criterion has been satisfied, 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.<sup>255</sup> Instead, courts prefer

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Attorney-Client Privilege, 59 Geo. Wash. L. Rev. 307, 317 (stating that 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.”).

<sup>254</sup> Imwinkelried, supra note 219, at 411.

<sup>255</sup> See, e.g., Smith v. State, 344 So.2d 915, 919 (Fla. Ct. App. 1977). In Smith, the court held that inquiry should not be made into whether a communication between spouses was incident to, rather than because of, the marital relationship, as argued by the state. According to the 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 crime where the spouses acted jointly or if one spouse is charged with a

an absolute rule that confidential communications between spouses will be considered privileged, as this approach 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 . . . .”<sup>256</sup> Therefore, even if the first criterion of the individual autonomy approach calls for recognition of the marital communications privilege, the privilege might not apply depending on the communicating spouse’s purpose, thereby making the privilege qualified or conditional rather than absolute.<sup>257</sup>

The second criterion of the individual autonomy approach 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. 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 the layperson 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.”<sup>258</sup> In each of the professional

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crime against the other spouse or the child of the other spouse. See, e.g., Ala. R. Evid. Rule 504(d); Fla. Stat. Ann. § 90.504; Hi. R. Rev. 505; Me. R. Rev. Rule 504.

<sup>256</sup> Smith, 344 So.2d at 919.

<sup>257</sup> See Imwinkelried, supra note 219, § 5.4.4 at 420 (arguing that “the 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 note 274 and accompanying text.

<sup>258</sup> Black’s Law Dictionary (6<sup>th</sup> Ed.). Accord Dairy Farmers of America, Inc. v. Travelers Ins. Co., 292 F.3d 567, 572 (8<sup>th</sup> 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.” (internal quotations omitted)); Atlantic Richfield Co. v. Farm Credit Bank of Wichita, 226 F.3d 1138, 1163 (10<sup>th</sup> 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.”).

relationships, the professional has undertaken a fiduciary duty to act primarily for the benefit of the layperson.<sup>259</sup>

In contrast, many courts have held that the marital relationship is not inherently fiduciary.<sup>260</sup> These courts have held that a marriage is not inherently fiduciary because kinship alone is not enough to create the protected relationship.<sup>261</sup> Thus, “more than a 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.”<sup>262</sup> Additionally, most fiduciary relationships are based on an imbalance of knowledge and influence between the parties.<sup>263</sup> 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,

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<sup>259</sup> See, e.g., U.S. v. Chestman, 947 F.2d 551, 568 (2d 1991) (finding the attorney-client relationship to be “inherently fiduciary”); Gracey v. Eaker, 837 So.2d 348, 353 (Fla. 2002) (holding that a fiduciary relationship exists between psychotherapist and patient); State ex rel. Kitzmiller v. Henning, 437 S.E.2d 452, 454 (W. Va. 1993) (holding that 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). 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, 373-74 (Fla. 2002); F.G. v. MacDonnell, 696 A.2d 697, 702-03 (N.J. 1997); Destefano v. Grabrian, 763 P.2d 275, 283-84 (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, 1239-40 (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 nature,” depending on the facts of the case).

<sup>260</sup> See, e.g., Chestman, 947 F.2d at 568; In re Estate of Karney, 658 N.W.2d 796, 799 (Mich. 2003). 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 “[t]he marital relationship is the most confidential of all relationships . . .” (internal quotations omitted)).

<sup>261</sup> Chestman, 947 F.2d at 568.

<sup>262</sup> Id.

<sup>263</sup> See In re Karney, 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., 145 Cal.App.3d 369, 383 (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.”).

commitment and decision-making.<sup>264</sup> While one spouse may be more knowledgeable than the other, such an imbalance is not inherent to 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 approach 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 same cannot be said for the marital relationship.<sup>265</sup> As such, the marital communications privilege is not supported by the second criterion.

Finally, the third criterion of the individual autonomy approach requires that the protected relationship be centered on choices related to a fundamental life preference. In other words, this third criterion requires that the parties utilize the privilege to make choices and decisions about areas of one's life that deserve constitutional protection.<sup>266</sup> For example, where 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.<sup>267</sup> The third criterion would be satisfied where one spouse consults the other regarding constitutionally

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<sup>264</sup> For a description of the changing conception of marriage, see Elizabeth S. Scott, Rational Decisionmaking About Marriage and Divorce, 76 Va. L. Rev. 9 (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.

<sup>265</sup> It is true that a spouse may decide to subordinate her interests to those of her spouse, but such a decision is not inherent to 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.

<sup>266</sup> Imwinkelried, supra note 219, § 5.4.3 at 413.

<sup>267</sup> See supra note 257 and accompanying text.

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.”<sup>268</sup> Therefore, if marital communications relate to these constitutionally protected areas, then the individual autonomy approach 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 rationale behind the individual autonomy approach breaks down depending on the content of the communication, this approach 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 approach is applied to the marital communications privilege. The proponents of this approach 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.<sup>269</sup> 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 approach are quite similar. Each approach 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

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<sup>268</sup> Roe v. Wade, 410 U.S. 113, 152-53 (1973) (internal citations omitted).

<sup>269</sup> See supra Section IV.A.

not affect the flow of confidential communications between spouses, both the utilitarian and individual autonomy approaches call for abolishment of the privilege.

The informational privacy approach is the only approach that supports the existence of the marital communications privilege, but 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 approach 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 between betraying his or her spouse, lying or going to jail.<sup>270</sup> To be sure, many commentators argue that the informational privacy approach to 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.”<sup>271</sup> While this approach 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.<sup>272</sup>

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

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<sup>270</sup> Black, *supra* note 248, at 48.

<sup>271</sup> McCormick, *supra* note 26, § 86 at 385.

<sup>272</sup> See *Westinghouse*, 638 F.2d at 577-580 (allowing disclosure of employees’ medical records maintained by employer); *Plante*, 575 F.2d at 1136 (allowing disclosure of government officials’ private financial information); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir.1983) (allowing public inspection of state employees’ financial disclosure statements); *McKenna*, 451 F.Supp. at 1381 (allowing limited disclosure of firefighter applicants’ psychological examination results).

approaches.<sup>273</sup> 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 U.S. Supreme Court has stated, “[A]n uncertain privilege . . . is little better than no privilege at all.”<sup>274</sup>

The recognition of the marital communications privilege is justified under at least the informational privacy approach, and, for the time being, the privilege will remain absolute in nature. This article will conclude with a look at whether the use of Web-based email supports the informational privacy rationale behind the marital communications privilege.

## **V. Conclusion**

As stated earlier, the information privacy approach posits that marital communications should be protected because it is morally distasteful to force one spouse to betray the other. This approach stands for the proposition that the confidential nature of the marital relationship should not be violated by the government’s search for evidence. The informational privacy approach 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 approach does not support the view that communications sent via Web-based email should be protected by the marital communications privilege. The informational privacy approach 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

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<sup>273</sup> See Goode, *supra* note 253, at 316 n.63 (noting that judicial reliance on theories other than the utilitarian approach are “as rare as the proverbial hen's tooth.”).

<sup>274</sup> *Upjohn*, 449 U.S. at 393.

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 wherein the communicating spouse had contractually agreed to allow the messenger access to the content of the postcard. If the messenger exercises 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 email 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 in 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.