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# ***STATE V. GUTIERREZ* ABOLISHING THE SPOUSAL COMMUNICATIONS PRIVILEGE: AN OPINION RAISING PROFOUND QUESTIONS ABOUT THE FUTURE OF EVIDENTIARY PRIVILEGES IN THE UNITED STATES**

Edward J. Imwinkelried\*

“The privacy and humanistic justifications . . . seem little more than soaring rhetoric and legally irrelevant sentimentality.” *State v. Gutierrez*, 2021-NMSC-008, ¶ 32, 482 P.3d 700, 710.

## **INTRODUCTION**

Until recently, there was a unanimous consensus recognizing the evidentiary privilege shielding confidential communications between spouses. Not only did federal courts, including the Supreme Court,<sup>1</sup> recognize the existence of the privilege, but every state recognized some form of it as well.<sup>2</sup> The giant of American Evidence law, Dean Henry Wigmore, opined that there is a “natural repugnance” at compelling one spouse to betray another spouse’s confidence.<sup>3</sup> In the words of one lower federal court, there was agreement that spouses are entitled to a “circle of privacy” protecting their secret communications as “inviolable.”<sup>4</sup>

However, in August 2019, a majority of the justices on the New Mexico Supreme Court decided to break with that tradition. In *State v. Gutierrez*,<sup>5</sup> over two dissents, the majority decided to prospectively abolish the spousal communications privilege in that state.

The *Gutierrez* majority considered and rejected two rationales that were advanced to justify the continued recognition of the privilege. One was the traditional instrumental or utilitarian rationale.<sup>6</sup> According to this rationale, a typical layperson is unlikely to consult with or confide in confidants such as attorneys and psychotherapists without the assurance of the existence of a formal evidentiary

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1. *See* *Trammel v. United States* 445 U.S. 40, 51 (1980); *see also* *Blau v. United States*, 340 U.S. 332, 333, 334 (1951); *see also* *Wolfe v. United States*, 291 U.S. 7, 14 (1934).

2. *State v. Gutierrez*, 2021-NMSC-008, ¶ 94, 482 P.3d 700, 720–21 n.1 (Vigil, J., concurring in part, dissenting in part), *rev’d on reh’g*.

3. 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2228, at 217 (4th ed. 1961).

4. *United States v. Neal*, 532 F.Supp. 942, 946 (D. Colo. 1982).

5. 2021-NMSC-008, ¶ 82, 482 P.3d at 704.

6. *Id.* ¶ 15, 482 P.3d at 706.

privilege. In essence, the recognition of a privilege is essential to protecting the confidential relationship. The majority concluded that this rationale did not warrant recognizing a spousal privilege. The court stated that that rationale would support the privilege only if “(1) married people know the privilege exists, and (2) they rely on it when deciding how much information to share” with their spouse.<sup>7</sup> The majority asserted that it is unrealistic to think that either assumption is true. It doubted that most spouses are aware of the privilege<sup>8</sup> and that, in any event, communicating spouses rely most heavily on the trust they place in each other rather than any formal evidence doctrine.<sup>9</sup> In reaching its decision, the majority sharply distinguished the spousal privilege from professional privileges such as the attorney-client and medical privileges.

After concluding that the privilege is indefensible under the instrumental rationale, the majority turned to an alternative, humanistic rationale that has been used to justify its existence. Proponents of this theory argue that the government should recognize privileges to promote autonomy and enable citizens to make more intelligent, independent life preference choices.<sup>10</sup> The argument continues that legislatures and courts ought to recognize privileges, at least in private areas, such as the marital relationship in which citizens have a constitutional right to make such autonomous choices. The majority dismissed this case for the spousal privilege as “little more than soaring rhetoric.”<sup>11</sup>

As previously stated, the majority rendered its decision over dissent. Since the majority parted company with both the federal judiciary and every other state, the decision was bound to be controversial. It came as no surprise that on September 15, 2019, a motion for rehearing was filed.<sup>12</sup> On June 26, 2020, the court did an about-face. On that date, the court granted the rehearing and reinstated the privilege to allow the state evidence rules committee an opportunity to consider the question.<sup>13</sup> In his order to rehear the case, Chief Justice Vigil urged that “the Court should hear the opinions of civil litigants and other jurists before the wholesale abolition of the privilege.”<sup>14</sup> This article is intended to contribute to that discussion about the future of the privilege.

Part I of this article is a detailed description of the original *Gutierrez* decision, the dissents as well as the majority opinion. Part II then critically evaluates the majority’s analysis of the application of the instrumental theory to the spousal communications privilege. Part II argues that the majority correctly concluded that the instrumental case for the spousal privilege is weak. The majority rigorously applied the instrumental criteria to the privilege and came to the honest, realistic conclusion that, in most cases, spouses would consult and confide even if there were no spousal privilege. However, Part II points out that the majority failed to appreciate that a similar approach to the professional privileges would call many of them into

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7. *Id.* ¶ 21, 482 P.3d at 708.

8. *Id.* ¶ 22, 482 P.3d at 708.

9. *Id.* ¶ 25, 482 P. 3d at 708.

10. *Id.* ¶ 20, 482 P.3d at 707.

11. *Id.* ¶ 32, 482 P.3d at 710.

12. *Id.* ¶ 112, 482 P.3d at 725.

13. *Id.* ¶ 111, 482 P.3d at 724.

14. *Id.* ¶ 109, 482 P.3d at 724.

question. The majority implicitly overstated the case for those privileges under the instrumental theory. The upshot is that the majority's decision not only raised the issue of the viability of the spousal privilege under the instrumental rationale but also the much more profound question of the soundness of continuing to rely on that traditional rationale as the exclusive justification for recognizing privileges in American evidence law. The thesis of this article is that relationships such as marriage should receive privilege protection, but to secure that protection, courts will have to move beyond the instrumental rationale.

Part III takes up the alternative, humanistic rationale. Part III respectfully submits that there is more to the humanistic theory than "overblown rhetoric." Quite to the contrary, Part III explains that the humanistic theory furnishes a strong, constitutional basis for recognizing evidentiary privileges for certain personal and professional relationships. While the majority overestimated the strength of the case for recognizing professional privileges under the instrumental rationale, it underestimated the strength of the humanistic rationale. Part III demonstrates that, given the weakness of the instrumental case for many privileges, going forward, reliance on the humanistic theory is essential to protecting privacy in the United States. The protection of privacy has been called "the major social issue of the information society."<sup>15</sup> If, in the future, other courts apply the instrumental theory with the same honesty and realism as the *Gutierrez* majority, the instrumental theory will prove to be inadequate to provide that protection.

### I. A DESCRIPTION OF THE *GUTIERREZ* DECISION

*Gutierrez* was a murder prosecution. The government alleged that the accused, David Gutierrez, had shot and killed the uncle of his then wife, Nicole. The shooting occurred in a boxcar that the uncle was using as a home. According to Nicole, while she and the accused were married, she told the accused that when she was 13 or 14 years old, the uncle had raped her.<sup>16</sup> Several months later, the accused told her "not to worry about anything anymore."<sup>17</sup> On the day of the uncle's death, the accused came home visibly upset. Between that date and the trial, the accused and Nicole divorced. Over a defense privilege objection at trial, Nicole was permitted to testify that when the accused returned home that day, he said that he "took care of it"—which she understood to mean that he had killed her uncle.<sup>18</sup> The accused then instructed her to accompany him to the boxcar to pick up a shotgun shell. Nicole testified that later the accused told her that if she ever told anyone about what had happened, she would meet the same fate as her uncle.<sup>19</sup>

After the accused and Nicole divorced, he took a second wife, Evelyn. At the time of trial, they were still married but had not spoken in years. Like Nicole, Evelyn was permitted to testify, over a defense privilege objection, to statements that the accused had made to her during their marriage. In particular, Evelyn was allowed

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15. Randolph J. May, *When Traditional Civil Liberties Advocates Start Lobbying for Privacy, Who Will Make Sure that Speech Remains Free?*, 24 LEGAL TIMES, Apr. 30, 2001, at 62.

16. See *Gutierrez*, 2021-NMSC-008, ¶ 4, 482 P.3d at 703.

17. *Id.*

18. See *id.*

19. See *id.*

to testify that the accused told her that he had killed Nicole's uncle after Nicole claimed he had molested her.<sup>20</sup>

As the Introduction noted, in *Gutierrez*, the majority decided to abolish the spousal communication privilege in that state. However, the majority did so only prospectively.<sup>21</sup> Since the privilege was in force at the time of the key events in *Gutierrez*, the majority had to decide whether the trial judge had erred in overruling the defense privilege objections. The majority found that some of the accused's statements to his then-wives were unprivileged. For example, the majority ruled that the accused's threat to Nicole was unprotected; it would be anomalous to extend the privilege, intended to protect the marital relation, to statements in which one spouse threatens another.<sup>22</sup> But, the majority also concluded that the trial judge had erred because some of the statements admitted were privileged at the time they were made.<sup>23</sup> Given the other, extensive evidence of the accused's guilt, though, the majority characterized the error as harmless.<sup>24</sup>

The focus of this article is the majority's decision to abolish the privilege. Part A describes the majority's reasoning while Part B reviews the position of the dissenting justices.

### A. The Majority

The majority began its analysis by emphasizing that the primary objective of the justice system is the "pursuit of truth."<sup>25</sup> The majority quoted Justice Frankfurter to emphasize that a court should block a relevant inquiry only if doing so "produces a 'public good' that transcends 'the normally predominant principle of utilizing all rational means for ascertaining truth.'"<sup>26</sup> Since evidentiary privileges can block the pursuit of truth, they "are not lightly created nor expansively construed."<sup>27</sup>

After stating those generalizations, the majority shifted its focus to the specific privilege asserted in *Gutierrez*, namely, the privilege for confidential spousal communications.<sup>28</sup> The majority acknowledged that in the past, many courts, including the Supreme Court, had virtually waxed poetic about the privilege. The majority quoted an 1839 statement by the Supreme Court about the privilege:

This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and deepest

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20. *See id.* ¶ 5, 482 P.3d at 704.

21. *See id.* ¶ 39, 482 P.3d at 711.

22. *See id.* ¶ 48, 482 P.3d at 713 (first quoting 81 AM. JUR. 2D *Witnesses* § 301 (2019); and then 98 C.J.S. *Witnesses* § 323, at 293 (2013)).

23. *See id.* ¶ 49, 482 P.3d at 713.

24. *See id.* ¶ 57, 482 P.3d at 714.

25. *See id.* ¶ 10, 482 P.3d at 705.

26. *Id.* (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

27. *Id.* ¶ 12, 482 P.3d at 705 (quoting *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 18, 138 N.M. 398, 120 P.3d 820).

28. *See id.* ¶ 14, 482 P.3d at 706.

relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence.<sup>29</sup>

Despite such language and the long lineage of the privilege, the majority decided that the primacy of the search for truth required the court to inquire whether it is modernly defensible to recognize the privilege.<sup>30</sup> Ultimately, the majority answered that question in the negative. Although the majority leveled a number of criticisms of the privilege,<sup>31</sup> the basic thrust of the majority's position is that the privilege cannot be rationalized under either an instrumental or humanistic theory.

*i. The Majority's Critique of the Instrumental Case for the Privilege*

In the process of reaching its conclusion, the majority weighed two different proposed rationales for the privilege. The first was the traditional instrumental or utilitarian theory.<sup>32</sup> Under that theory, it is justifiable to recognize a privilege only if it is an essential instrument or means of protecting an important social relation.<sup>33</sup> Although the majority did not deny that marriage is such a relation, the majority reasoned that the recognition of the privilege is not a vital means of protecting the relationship.

Citing the leading Wright and Graham treatise,<sup>34</sup> the majority explained that the instrumental case for the privilege posits two assumptions: that spouses are aware of the privilege's existence and that awareness plays a major role in spouses' decisions whether to confide in each other. The majority disputed both assumptions. With respect to the first, the majority cited a classic 1929 article by Hutchins and Slesinger, who asserted that, in all probability, most married persons untrained in the

29. *See id.* ¶ 15, 482 P.3d at 706 (quoting *Stein v. Bowman*, 38 U.S. 209, 223 (1839)).

30. *See id.* ¶ 26, 482 P.3d at 709.

31. *See id.* ¶ 27, 482 P.3d at 709 (stating that the privilege is under-inclusive in the sense that the privilege does not extend to nonverbal interactions, allowing one spouse to testify “whether his or her spouse uttered inculpatory remarks in their sleep or . . . they exhibited other . . . behaviors like nervousness, tiredness, or illness”); *see id.* ¶ 30, 482 P.3d at 710 (stating that the privilege reflects outmoded notions of marriage that benefit men more than women); *see id.* ¶ 30 482 P.3d at 710 (citing an estimate that 90% of the spousal privilege cases involve wives testifying against husbands); *see id.* ¶ 31 482 P.3d at 710 (“Feminist scholars have vigorously attacked the privilege suggesting that it was ‘created to protect men, who are often reluctant to share their personal thoughts and may need the assurance of protection that the privilege rules supply, rather than women, who are more likely to decide to confide in others independent of the evidentiary safeguard.’”) (citing Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413, 440 (1991)); *see id.* (stating that some feminist commentators had attacked marital privacy on the ground that it has been invoked to shield evidence of “violence against women.”) (citing Malinda L. Seymore, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032, 1072–73 (1995–96)).

32. *See id.* ¶ 15, 482 P.3d at 706 (citing *Stein v. Bowman*, 38 U.S. 209, 233 (1839)).

33. *Id.* (first citing *Stein v. Bowman*, 38 U.S. 209, 233 (1839); then citing 1 KENNETH S. BROUN, MCCORMICK ON EVIDENCE, § 86, at 523 (7th ed. 2013); then citing 25 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE: EVIDENCE, § 5572, at 518–19 (1989); then citing *Wolfe v. United States*, 291 U.S. 7, 14 (1934); and then citing R. Michael Cassidy, *Reconsidering Spousal Privileges After Crawford*, 33 AM. J. CRIM L. 339, 358 (2006)).

34. *Id.* ¶ 21, 482 P.3d at 708 (citing 25 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5572, at 532–33 (1989)).

law are “entirely unaware” of the privilege.<sup>35</sup> The majority pointed out that when the Supreme Court initially submitted the draft Federal Rules of Evidence to Congress, the draft omitted the spousal communications privilege.<sup>36</sup> With respect to the second assumption, the majority quoted the seventh edition of the McCormick treatise<sup>37</sup>—the original version of which, like the Wigmore treatise, is cited extensively in the Advisory Committee Notes to the Federal Rules.<sup>38</sup> The McCormick treatise opines: “the contingency of courtroom disclosure [is not] in the minds of [spouses] in considering how far they should go in their secret conversations.”<sup>39</sup> Like the McCormick treatise, the majority believed that it is much more realistic to suppose that in their confidential interactions, spouses rely on the “trust they place in the loyalty and discretion of each other.”<sup>40</sup> In the majority’s view, the privilege is significantly over-inclusive in the sense that it extends protection to many statements that the spouses would make even if there were no privilege.

The majority stressed that the spousal privilege is clearly distinguishable from professional privileges such as those for “doctors and lawyers.”<sup>41</sup> It reasoned that the United States Supreme Court itself has defended the application of the instrumental rationale to the attorney-client<sup>42</sup> and psychotherapist-patient<sup>43</sup> privileges. The majority noted that in the professional setting, the lay client or patient is more likely to be aware of the existence of a formal privilege, and the abolition of such a privilege is thus far more likely to have a significant chilling effect on the relationship.<sup>44</sup>

*ii. The Majority’s Rejection of the Proposed Humanistic Rationale for the Privilege*

The majority acknowledged that the instrumental rationale is not the only policy justification that has been propounded for privileges generally or the spousal

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

36. *Id.* (citing Rules of Evidence for United States Courts and Magistrates, 56 F.D.R. 183, 246 Advisory Committee’s Note to Rule 505 (1973)).

37. *Id.* (citing 1 KENNETH S. BROUN, MCCORMICK ON EVIDENCE, § 86, at 523 (7th ed. 2013)).

38. See COMM. ON RULES OF PRAC. AND PROC. OF THE JUD. CONF. OF THE U.S., PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES (1969) (citing CHARLES T. MCCORMICK, MCCORMICK’S HANDBOOK ON THE LAW OF EVIDENCE, (1st ed. 1954)).

39. *Gutierrez*, 2021-NMSC-008, ¶ 23, 482 P.3d at 708 (quoting 1 KENNETH S. BROUN, MCCORMICK ON EVIDENCE, § 86, at 523 (7th ed. 2013)).

40. *Id.*

41. *Id.* ¶ 28, 482 P.3d at 709.

42. *Id.* ¶ 24, 482 P.3d at 708 (first citing *Fisher v. United States*, 425 U.S. 391, 403 (1976) (“[The attorney-client] privilege protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege”); and then citing *Swidler & Berlin v. United States*, 524 U.S. 399, 408 (1998) (“[T]he loss of evidence admittedly caused by the [attorney-client] privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place.”)).

43. *Id.* ¶ 43, 482 P.3d at 708 (citing *Jaffee v. Redmond*, 518 U.S. 1, 11–12 (1996)) (concluding that any benefit of refusing to recognize the privilege would be modest because the absence of a privilege would discourage communications).

44. *Id.*

privilege in particular.<sup>45</sup> It observed that “humanistic and privacy arguments” have been advanced as well.<sup>46</sup> While the majority accepted the instrumental rationale and found that it did not apply to the spousal privilege, at a more fundamental level, the majority outright rejected the humanistic rationale. The majority identified several strands of thought that the defense contended justified recognition of the privilege:

- There is a natural moral repugnance at forcing one spouse to testify to another spouse’s confidences;<sup>47</sup>
- Spouses are constitutionally entitled to a circle of privacy relatively free from government supervision or observation;<sup>48</sup> and
- Spouses have a fundamental right to decisional privacy that enables them to make more intelligent, independent life preference choices.<sup>49</sup>

Although the majority acknowledged that one Supreme Court decision, *Griswold v. Connecticut*,<sup>50</sup> seemingly lent some legitimacy to these non-instrumental policy concerns, it was unpersuaded in the final analysis. The majority expressed its agreement with the distinguished Evidence commentator, Professor Edmund Morgan, that these concerns amounted to nothing more than “mere sentiment.”<sup>51</sup> The majority invoked Wigmore’s treatise as authority that a mere sentiment “do[es] not justify interference with courts’ truth-seeking function.”<sup>52</sup> The majority forcefully stated that, without more, “soaring rhetoric and legally irrelevant sentimentality” do not warrant continued enforcement of a privilege that obstructs the search for truth.<sup>53</sup>

## B. The Opinions Concurring in Part and Dissenting in Part

There were two other noteworthy opinions in *Gutierrez*. Both opinions concur in part and dissent in part.

### i. Justice Daniels’ Opinion

Justice Daniels filed one such opinion. On the one hand, he shared the majority’s view that as a matter of policy, the spousal privilege ought to be abolished. He characterized the privilege as “regrettable”<sup>54</sup> and favored the abolition or severe evisceration of the husband-wife communication privilege. Justice Daniels opined

45. See *id.* ¶ 16 482 P.3d at 706.

46. *Id.* (first citing 1 KENNETH S. BROWN, MCCORMICK ON EVIDENCE, § 72, at 467–68 (7th ed. 2013); and then *Ryan v. Comm’r of Int’l Revenue*, 568 F.2d 531, 543 (7th Cir. 1977)).

47. *Id.* ¶ 17 428 P.3d at 706–07 (first citing 1 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE, § 2.3, at 136–37 (2d ed. 2010); then 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE, § 5:39, at 731 (4th ed. 2013); and then 1 KENNETH S. BROWN, MCCORMICK ON EVIDENCE, § 86, at 524 (7th ed. 2013)).

48. *Id.* ¶ 19, 482 P.3d at 707 (citing *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965)).

49. *Id.* ¶ 20, 482 P.3d at 707–08.

50. *Id.* ¶ 19, 482 P.3d at 707 (citing *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965)).

51. *Id.* ¶ 26, 482 P.3d at 709 (citing Edmund M. Morgan, *Foreword* to MODEL CODE OF EVIDENCE at 5 (AM. L. INST. 1942)).

52. *Id.* ¶ 26, 482 P.3d at 709 (citing 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2228, at 217 (4th ed. 1961)).

53. *Id.* ¶¶ 32–33, 483 P.3d at 710.

54. *Id.* ¶ 108, 482 P.3d at 724 (Daniels, J., concurring in part, dissenting in part).



that the privilege obstructs the truth-seeking mission of our courts in order to protect criminals and other law-evaders and tort-feasors from being held responsible for their unlawful actions. “[A]ll this to hold sacred the marriage of Bonnie and Clyde?”<sup>55</sup> On the other hand, he believed that it was unwise to make such “a significant change”<sup>56</sup> in the state’s settled evidence law without following the established rules process, including input from both the state rules committee and the larger legal community.

*ii. Justice Vigil’s Opinion*

The other opinion was filed by Justice Vigil.<sup>57</sup> Near the end of her opinion, Justice Vigil made the recommendation that Justice Daniels supported, namely, that any change be made through the normal rules process.<sup>58</sup> She thought that it was “imprudent” to abolish the privilege “by fiat.”<sup>59</sup>

However, Justice Vigil devoted the bulk<sup>60</sup> of her opinion to a defense of the privilege. She argued that the majority should “pause”<sup>61</sup> and give more thorough consideration to the fact that, by virtue of its decision, “New Mexico will be the only state in the United States without some form of marital privilege.”<sup>62</sup> The majority’s decision represented “a drastic departure from the practice in other jurisdictions.”<sup>63</sup>

On the policy merits of the privilege, Justice Vigil believed that the majority was making a grave mistake. She voiced her belief that the spousal relation is especially worthy of legal protection. She emphasized that “[m]arriage [i]s a [c]ornerstone of [c]ivil [s]ociety.”<sup>64</sup> The relationship is supported by values such as fidelity and contract as well as religious beliefs calling for “a sacred space . . . free from state intrusion.”<sup>65</sup> The United States Supreme Court has echoed similar sentiments. As recently as its 2015 decision in *Obergefell v. Hodges*,<sup>66</sup> announcing a right to same-sex marriage, the United States Supreme Court has declared that “[n]o

55. *Id.*

56. *Id.*

57. *Id.* ¶ 84, 482 P.3d at 718 (Vigil, J., concurring in part, dissenting in part).

58. *See id.* ¶ 103, 482 P.3d at 723.

59. *Id.* ¶ 97, 482 P.3d at 722.

60. At one point, Justice Vigil also responded to the majority’s argument that in the past, the privilege had sometimes been invoked to suppress evidence of violence against women. She pointed out that:

In New Mexico, the privilege does not apply when one spouse is charged with a crime against the other spouse or the children of either spouse. Thus, the spousal communications privilege would not block the testimony of an abused spouse in a domestic violence case, even if that testimony disclosed confidential marital communications. I share the Majority’s concern for victims of domestic violence but find that this concern is adequately addressed in the exceptions to the privilege. . . .

*Id.* ¶ 96, 482 P.3d at 721–22 (citation omitted).

61. *See id.* at 718.

62. *Id.* ¶ 94, 482 P.3d at 720–21.

63. *Id.* ¶ 94, 482 P.3d at 721.

64. *Id.* ¶ 87, 482 P.3d at 719.

65. *Id.* ¶ 85, 482 P.3d at 718.

66. 576 U.S. 644 (2015).

union [in society] is more profound.”<sup>67</sup> On another occasion, the Supreme Court had asserted that marriage is “the foundation of the family and of society.”<sup>68</sup>

Justice Vigil then elaborated that the recognition of a privilege for spousal communications is an appropriate form of protection for marriage. In her mind, “marriages are strengthened when spouses are free to communicate with each other without fear of government intrusion.”<sup>69</sup> After pointing to the majority’s acknowledgment that intrusions into marital privacy are morally repugnant,<sup>70</sup> she asserted that the majority was seriously mistaken in dismissing that insight as “legally irrelevant.”<sup>71</sup> In her view, the existence of that intense moral reaction is itself strong evidence that the privilege serves to safeguard a “basic human value[]”<sup>72</sup>—a weightier value than the mere “collection of evidence”<sup>73</sup> in “ordinary litigation.”<sup>74</sup>

## II. A CRITICAL EVALUATION OF THE *GUTIERREZ* MAJORITY’S CONCLUSION THAT THE INSTRUMENTAL RATIONALE DOES NOT JUSTIFY THE RECOGNITION OF A SPOUSAL COMMUNICATIONS PRIVILEGE

Subpart A describes Dean Wigmore’s instrumental criteria for recognizing a privilege. Subpart B then applies those criteria to the spousal privilege. Subpart B concludes that the majority applied the criteria realistically and correctly concluded that continued recognition of the privilege cannot be justified by exclusive reliance on the instrumental rationale. Subpart C adds that, although the majority matter-of-factly assumed that other doctrines such as the medical and legal privileges can be justified by exclusive reliance on that rationale, a similarly rigorous application of the criteria to those privileges would call their continued existence, or at least their broad scope, into serious question.

### A. Dean Wigmore’s Instrumental Criteria for Determining Whether to Recognize a Communications Privilege

At the outset of its opinion, the *Gutierrez* majority underscored that the discovery of truth is the primary objective of the judicial system.<sup>75</sup> The majority then indicated that since the spousal communications privilege obstructs the discovery of truth, the majority would uphold the privilege only if it passed muster under the

67. *Gutierrez*, 2021-NMSC-008, ¶ 87, 482 P.3d at 719 (quoting *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015)).

68. *Id.* ¶ 88, 482 P.3d at 719 (quoting *Obergefell*, 576 U.S. at 669).

69. *Id.* ¶ 99, 482 P.3d at 719 (citing Mark Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CAL. L. REV. 1353, 1371 (1973)).

70. *Id.* ¶ 91, 482 P.3d at 720.

71. *Id.*

72. *Id.* ¶ 91, 482 P.3d at 720 (citing 25 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5572, at 466 (1989)).

73. *Id.* ¶ 93, 482 P.3d at 720.

74. *Id.* (quoting Charles L. Black, Jr., *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 48 (1975)).

75. *Id.* ¶ 10, 482 P.3d at 705.

instrumental or utilitarian rationale.<sup>76</sup> In these passages, the majority echoed Dean Wigmore's treatise. Dean Wigmore was a proponent of many of the evidentiary views of the great utilitarian philosopher, Jeremy Bentham. In his monumental work, *Rationale of Judicial Evidence*,<sup>77</sup> Bentham argued that rectitude of decision should be the end objective of judicial procedure.<sup>78</sup> Bentham dismissed most exclusionary rules as "rubbish."<sup>79</sup> Although he was willing to recognize a penitent-clergy privilege<sup>80</sup> and a privilege for state secrets,<sup>81</sup> he vehemently attacked other privileges, including attorney-client.<sup>82</sup>

Like Bentham, Dean Wigmore prioritized the objective of rectitude of decision and opposed technical evidentiary rules that impede the pursuit of that objective. As Wigmore wrote,

The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits . . . Every step beyond these limits helps to provide . . . an obstacle to the administration of justice.<sup>83</sup>

However, Wigmore was astute enough to see that Bentham's sweeping, frontal assaults on privileges had met with little success. In the words of the 1962 Judicial Conference Committee's Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts, for the most part, the common law of privileges had successfully "resisted" Bentham's attacks.<sup>84</sup> Wigmore himself observed that the common law privilege doctrines had weathered "the thunders of Bentham."<sup>85</sup>

For that reason, Wigmore devised a different, more limited strategy to promote the agenda of rectitude of decision: he decided to champion a set of instrumental criteria for recognizing privileges that was so rigorous that it would be difficult to justify either creating new privileges or expanding the scope of existing ones.<sup>86</sup> In perhaps the most famous passage in his celebrated treatise, Wigmore wrote:

Looking back upon the principle of privilege, as an exception to the general liability of every person to give testimony upon all

76. *See id.* ¶ 14, 15, 32, 33, at 706, 710.

77. 4 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* (1827).

78. *Id.* at 477.

79. *Id.* at 479.

80. *See id.* at 586.

81. *See* JEREMY BENTHAM, *Improper Exclusions – Lawyer and Client*, in 7 JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 473–75, 477–79 (Bowring ed. 1842).

82. *See id.*

83. Wigmore, *supra* note 3, § 2192, at 73.

84. Committee on Rules of Practice and Procedure, U.S. Judicial Conference, *Rules of Evidence: A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts* 43 (1962).

85. Wigmore, *supra* note 3, at 170.

86. *See* Steven R. Smith, *Constitutional Privacy in Psychotherapy*, 49 *GEO. WASH. L. REV.* 1, 40–41 (1980).

facts inquired of in a court of justice, and keeping in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception . . . four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:

(1) The communication must originate in the confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

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

Only if these four conditions are present should a privilege be recognized. These four conditions must serve as the foundation of policy for determining all . . . privileges, whether claimed or established.<sup>87</sup>

This passage has proved to be one of the most frequently cited passages in Dean Wigmore's privilege volume.<sup>88</sup>

Criterion (2) is the centerpiece of Wigmore's proposal and the passage that the *Gutierrez* majority implicitly relied on. In Wigmore's mind, that criterion was the key to reconciling the priority on rectitude of decision with the recognition of a very limited number of privileges. According to that criterion, the advocate of a privilege must demonstrate that, absent a privilege, the typical similarly situated person would be deterred from either consulting the third-party confidant or making necessary disclosures to the confidant. As Professor Melanie Leslie has explained,

In a perfect [Wigmorean] world, the privilege would shield no evidence. Privilege generates the communication that the privilege protects. Eliminate the privilege, and the communication disappears . . . [T]he privilege would protect only . . . statements that would not otherwise have been made. [T]he privilege is not a but-for cause of all [privileged] communications.<sup>89</sup>

If a proposed privilege satisfied Wigmore's criteria, especially (2), it "would generate no costs [to the judicial system] because all protected information would be undisclosed absent the privilege."<sup>90</sup> The Supreme Court has repeatedly approved of criterion (2). For example, in *Jaffee v. Redmond*,<sup>91</sup> the Court's landmark decision recognizing a patient-psychotherapist privilege, Justice Stevens wrote:

87. Wigmore, *supra* note 3, at 527–28.

88. See Kit Kinports, *The "Privilege" in the Privilege Doctrine: A Feminist Analysis of the Evidentiary Privileges for Confidential Communications*, in *FEMINIST PERSPECTIVES ON EVIDENCE* 79, 82 n.22 (Mary Childs & Louise Ellison eds. 2000).

89. Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 *WIS. L. REV.* 31, 31 (2000).

90. John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 *N.Y.U. L. REV.* 443, 480 (1982).

91. See generally *Jaffee v. Redmond*, 518 U.S. 1 (1996).

[T]he likely evidentiary benefit that would result from the denial of a [psychotherapy] privilege is modest. 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 . . . is unlikely to come into being. This unspoken “evidence” would therefore serve no greater truth-seeking function than if it had been spoken and privileged.<sup>92</sup>

Lower federal and state courts have similarly treated criterion (2) as an essential condition for upholding a privilege.<sup>93</sup> For its part, the original Advisory Committee for the Federal Rules of Evidence also approvingly cited Wigmore’s criteria.<sup>94</sup>

### **B. The Majority’s Realistic Application of Those Criteria to the Spousal Communications Privilege**

Although the *Gutierrez* majority does not quote Wigmore’s four criteria in its opinion or even cite the section number on point, the majority makes a general reference to the “instrumental or utilitarian rationale.”<sup>95</sup> The majority then proceeds to apply the second criterion in particular to the spousal privilege. Dean Wigmore himself had asserted that the privilege was “a mere cloak for sentimentality.”<sup>96</sup> It should come as no surprise that, after its analysis of the privilege, the majority concluded that the privilege does not meet the criteria.

The majority’s conclusion seems correct. The majority’s analysis is unsentimental and realistic. As the majority noted, the instrumental case for the privilege rests on two highly dubious assumptions: Most spouses realize that there is a formal evidentiary privilege protecting their communications, and but for that realization, spouses would not share confidences with each other.<sup>97</sup> It is much more plausible to assume awareness of the privilege in the professional context, such as the attorney-client relationship. Indeed, attorneys often begin sensitive consultations with current or prospective clients by informing them of the existence of the legal privilege. It is hard to imagine a spousal conversation beginning in that formal, legalistic fashion. Furthermore, the majority is certainly on solid ground when it asserts that, in the vast majority of their interactions, spouses consciously rely on their trust in each other rather than any assumption about the existence of an evidentiary privilege.<sup>98</sup> Anyone who has been married for any length of time would attest to the soundness of that assertion. If the spouses do not realize that there is a privilege, they cannot rely on it; and even if they have some awareness of the

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92. *See Id.* at 11–12.

93. *See* 1 EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* §3.2.3., at 131–33 (2002) (collecting cases).

94. Committee on Rules of Practice and Procedure, U.S. Judicial Conference, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates 89 (1969).

95. *State v. Gutierrez*, 2021-NMSC-008, ¶ 15, 482 P.3d 700, 706 (N.M. 2019).

96. Wigmore, *supra* note 3, at 643–44 (quoting EDMUND MORGAN ET AL., *Foreword to MODEL CODE OF EVIDENCE* 18 (AM. L. INST. 1942)).

97. *Gutierrez*, 2021-NMSC-008, ¶ 21, 482 P.3d 700, at 708.

98. *Id.*

privilege, in most instances, it will be far in the back of their minds. A consideration of the applicability of the spousal privilege is not at the forefront of the spouses' minds, if in their minds at all. The bottom line is that the majority is right when it declares that "[t]he traditional [instrumental] justification for the spousal communication privilege is premised on assumptions that do not withstand scrutiny."<sup>99</sup>

### C. The Majority's Failure to Subject Professional Privileges such as Doctor-Patient and Attorney-Client to Similarly Rigorous Scrutiny

If the majority had confined its discussion of the instrumental theory to the spousal privilege, it would be hard to fault that part of the majority's opinion. However, as the Introduction noted, the majority distinguished that privilege from professional privileges, namely, the privileges extending to "doctors and lawyers."<sup>100</sup> The majority appeared to matter-of-factly assume that those professional privileges easily satisfy Wigmore's criteria. However, if the majority had scrutinized those privileges in the same realistic fashion in which it analyzed the spousal privilege, the majority would have realized both that the instrumental cases for those privileges are much shakier than the majority presumed. A consistent application of the majority's realistic approach to other privileges would raise grave doubts about the wisdom of continuing to rely on the instrumental rationale as the sole basis for recognizing professional communications privileges. Although communications between the parties to these professional relationships, especially the attorney-client relationship, often begin with a legalistic statement about the existence of the privilege, both common sense and empirical studies indicate that in many cases the application of the privilege cannot be rationalized exclusively under the instrumental rationale.

#### i. The Medical Privilege

The *Gutierrez* majority referred to the professional privilege applicable to communications with "doctors."<sup>101</sup> The general medical privilege is distinct from the psychotherapy privilege. For example, in California the privileges are governed by different sets of statutes, California Evidence Code Sections 900–1007 for the former and Evidence Code Sections 1010–17 for the latter.

Although the majority evidently believed that the medical privilege satisfies Wigmore's criteria, Wigmore thought otherwise. He stated that it was "ludicrous" to think that a person in excruciating pain would withhold information from a physician out of fear of subsequent disclosure of the information in court.<sup>102</sup> If the patient was experiencing pain or significant discomfort, the patient's here-and-now need for pain relief was likely to trump any fear of later disclosure in a lawsuit that might never be filed. It is true that 42 of the 50 states recognize a general medical privilege.<sup>103</sup> However, they have done so by legislation. Wigmore himself attacked such legislation; he contended that it represented only the political clout of the medical

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99. *Id.* ¶ 32, 482 P.3d at 710 (alteration in original).

100. *Id.* ¶ 28, 482 P.3d at 709.

101. *Id.*

102. Wigmore, *supra* note 3, at 830.

103. Kinports, *supra* note 88, at 91 n.75.

profession and its successful lobbying efforts.<sup>104</sup> The draft Federal Rules omitted a medical privilege; and in defending the Advisory Committee's decision, Professor Cleary explained that it was foolish to assume that a privilege was needed to encourage a patient to communicate with a physician when the patient believes that "life itself may be in jeopardy."<sup>105</sup> It may be an overstatement to say, as some commentators have written, that the ordinary patient has "no thought of a lawsuit."<sup>106</sup> There are certainly cases in which the medical risk that the patient faces is relatively minor, but the legal consequences of the public revelation of the patient's communication to the doctor could be enormous. The patient might be acutely aware of those consequences if there has already been some mention of potential litigation. However, in the typical case it is "highly speculative"<sup>107</sup> to assume that the patient has any genuine concern about the prospect of later, judicially compelled disclosure. The *Gutierrez* majority may have thought that the instrumental case for the medical privilege was much stronger than that for the spousal privilege. However, if the majority had subjected that case to the same critical scrutiny that it applied to the spousal privilege, the majority would have realized that its realistic approach to applying the instrumental theory raises serious questions whether state legislatures and courts should continue to honor a general medical privilege. Like the spousal privilege, if you posit only the instrumental rationale, the medical privilege arguably suffers from serious over-inclusivity. The notion of over-inclusivity posits that the instrumental rationale warrants including some communications within the privilege's scope but acknowledges that there are many situations in which exclusive reliance on the instrumental rationale cannot support the application of the privilege.

#### ii. *The Legal Privilege*

For decades, courts and commentators have stated that the legal privilege is essential to effective attorney-client relations. In 1833 in *Greenough v. Gaskell*,<sup>108</sup> Lord Brougham declared that without the assurance of the privilege, "a man would not venture to consult any skillful person or would only dare to tell his counsel half his case." A century later, in the 1904 edition of their English text, John Cutler and Charles Cagney would write that "[i]n the absence of the [attorney-client privilege], no man would dare to consult a professional adviser with a view to his defence, or the enforcement of his rights."<sup>109</sup> In 1999, an intermediate California appellate court declared that "[w]ithout [the privilege], full disclosure by clients to their counsel would not occur."<sup>110</sup> Not to be outdone, in the same year the Connecticut Supreme Court asserted that the abolition of the privilege would mean "an end to all

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104. Wigmore, *supra* note 3, at 831.

105. *Rules of Evidence: Hearing on H.R. 5463 Before the H. Comm. on the Judiciary*, 93rd Cong. 557 (1973).

106. EDWARD MORGAN ET AL., MODEL CODE OF EVIDENCE at 28 (AM. L. INST. 1942).

107. JOHN WILLIAM STRONG ET AL., MCCORMICK ON EVIDENCE 1, at 382 (4th ed. 1992); *see also* ROBERT P. MOSTELLER ET AL., MCCORMICK ON EVIDENCE 1, at 692–93 (8th ed. 2020).

108. 1 Myl. & K. 98, 103 (1833).

109. JOHN CUTLER & CHARLES F. CAGNEY, POWELL'S PRINCIPLES AND PRACTICE OF THE LAW OF EVIDENCE 102 (8th ed. 1904).

110. *State Comp. Ins. Fund v. WPS, Inc.*, 70 Cal. App. 4th 644, 657, 82 Cal. Rptr. 2d 799, 808 (Cal. Ct. App. 1999).

confidence between the client and attorney.”<sup>111</sup> Of course, if that is true, the legal privilege unquestionably satisfies Wigmore’s instrumental criteria.

The question is whether these sweeping generalizations—the “legal establishment” view—are true. As previously stated, Wigmore’s predecessor, Bentham, opposed the legal privilege.<sup>112</sup> Again, Wigmore himself had opined that many statutory privileges, such as the medical privilege, were not the result of a careful legislative analysis of the social need for the doctrine; rather, they reflected primarily the successful lobbying efforts of influential “organized occupational groups.”<sup>113</sup> Although originally the attorney-client privilege was a creature of common law in most jurisdictions,<sup>114</sup> it could be suggested that a subconscious professional bias may have influenced the courts’ decision to recognize the privilege. After all, the vast majority of the judges writing the opinions heaping praise on the privilege were formerly practicing attorneys, members of the very profession staking claim to the privilege.

Moreover, while Judge Brougham’s reference to “his case” and Cutler and Cagney’s mention of “his defence” assume clients concerned about litigation, the modern legal privilege is not confined to the litigation context; today, the privilege reaches well beyond that arena. As the Supreme Court has observed, an alternative doctrine, the work-product immunity, ordinarily applies only to documents created “with an eye toward litigation.”<sup>115</sup> In contrast, the attorney-client privilege is not so limited. To be sure, the prospect or pendency of litigation is likely to heighten the client’s concern about confidentiality, at least about shielding confidential communications from the present or prospective adversary. However, in the modern era<sup>116</sup> the scope of the attorney-client privilege has become much more expansive than protecting those communications surrounding litigation. The privilege extends to any communication incident to “consultations for legal advice.”<sup>117</sup> Litigation need not even be threatened.<sup>118</sup> The present or prospective client can be consulting the

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111. *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 730 A.2d 51, 60 (Conn. 1999) (quoting *Godder v. Gardner*, 28 Conn. 172, 175 (Conn. 1859)).

112. Bentham, *supra* note 77, at 304.

113. Wigmore, *supra* note 3, at 532.

114. Today, however, many jurisdictions have detailed statutory regulations of the privilege. *E.g.*, CAL. EVID. CODE §§ 950–62 (West 2022).

115. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). A very small minority of jurisdictions extend the immunity to documents reflecting an attorney’s transactional work. *E.g.*, *League of Cal. Cities v. Superior Court*, 194 Cal. Rptr. 3d 444, 457 (Cal. Ct. App. 2015) (citing *Cnty. Of Los Angeles v. Superior Court*, 98 Cal. Rptr. 2d 564, 574 (Cal. Ct. App. 2000)); *see also* *Rumac, Inc. v. Bottomley*, 192 Cal. Rptr. 104, 107 (Cal. Ct. App. 1983).

116. Some early English cases limited the privilege to communications related to litigation. Geoffrey C. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1071 (1978).

117. Joseph Pratt, Comment, *The Parameters of the Attorney-Client Privilege for In-House Counsel at the International Level: Protecting the Company’s Confidential Information*, 20 NW. J. INT’L L. & BUS. 145, 150 (1999).

118. *Wellpoint Health Networks v. Superior Court*, 68 Cal. Rptr. 2d 844, 850 (Cal. Ct. App. 1997) (quoting *Roberts v. City of Palmdale*, 853 P.2d 496, 500 (Cal. 1993)).



attorney as a counselor or planner doing transactional work rather than as a litigator.<sup>119</sup>

The question, then, is whether such a broad legal privilege passes muster under Wigmore's instrumental criteria. It is submitted that if the legal privilege is subjected to the same realistic, rigorous approach to the instrumental criteria that the *Gutierrez* majority used, in several respects, the contemporary legal privilege would be assailable. Three leading empirical studies are pertinent.

In 1962, the *Yale Law Journal* published a study of the assumptions underpinning the attorney-client privilege.<sup>120</sup> The researchers surveyed the attitudes of several groups, including laypersons, lawyers, and judges. To be sure, some findings in the study lend support to the privilege. For instance, question number six asked laypersons whether the absence of an evidentiary privilege would make them "less likely to make free and complete disclosure" to an attorney. Roughly half of the laypersons answered in the affirmative.<sup>121</sup> However, that answer has marginal significance because the question did not ask the respondents to specify whether the absence of a privilege would have a major, moderate, or only minimal impact on their willingness to disclose. Moreover, perhaps surprisingly, when asked whether there should be a legal privilege, fewer than half of the laypersons answered "Yes."<sup>122</sup> The laypersons' response to question number eight is also revealing. Less than a third believed that the privilege allowed an attorney "to refuse to reveal the client's confidences whenever ordered to do so by a judge."<sup>123</sup> In short, most were willing to disclose to their attorney even on the erroneous assumption that the judge has the power to simply override the privilege on an ad hoc, case-specific basis. Commenting on this study, Professor Fred Zacharias stated that the findings in the study "support the notion that confidentiality rules have *some* impact on the way clients use attorneys[,] [b]ut they also cast doubt on whether the effect is as substantial as proponents of confidentiality presume."<sup>124</sup>

In part, because the Yale study called into question the received orthodoxy about the legal privilege, Professor Zacharias conducted his own study in the 1980s.<sup>125</sup> In his study, Professor Zacharias interviewed attorneys and laypersons in

119. *United States v. Chen*, 99 F.3d 1495, 1500–02 (9th Cir. 1996) (quoting HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 205–06 (10th ed. 1958)); *Watkins L. & Advoc., P.L.L.C. v. U.S. Dep't of Veteran's Affs.*, 412 F. Supp. 3d 98, 112 (D.D.C. 2019) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980)) (noting privilege "is not limited to communications made in the context of litigation or even a specific dispute"); *Sapia v. Bd. of Educ.*, 351 F. Supp. 3d 1125, 1131 (N.D. Ill. 2019) (citing *Sandra T.E. v. S. Berwyn Sch. Dist.*, 600 F.3d 612, 621 (7th Cir. 2010)) ("[P]rivilege attaches to . . . any legal advice . . . not just legal advice for litigation."); *Roseberry-Andrews v. Dep't of Homeland Sec.*, 299 F. Supp. 3d 9, 27 (D.D.C. 2018) (quoting *Sea Shepherd Conservation Soc'y v. IRS*, 89 F. Supp. 3d 81, 103 (D.D.C. 2015)); *Zurich Am. Ins. Co. v. Superior Court*, 66 Cal. Rptr. 3d 833, 838 (Cal. Ct. App. 2007) (quoting *Wellpoint Health*, 68 Cal. Rptr. 2d at 850) (noting "transactional advice" is privileged).

120. Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 *YALE L. J.* 1226, 1226–27 (1962).

121. *Id.* at 1262.

122. *Id.*

123. *Id.*

124. Fred C. Zacharias, *Rethinking Confidentiality*, 74 *IOWA L. REV.* 351, 377–78 (1989).

125. *Id.* at 352, 377–79.

Tompkins County, New York.<sup>126</sup> Their responses convinced Professor Zacharias that “strict” privilege rules are not essential.<sup>127</sup> He reported that “when the . . . respondents were asked whether they would still withhold information if the lawyer ‘promised confidentiality except for specific types of information which he/she described in advance,’ only 15.1% said they would withhold.”<sup>128</sup> The responses revealed that most laypersons assume that the privilege has a very limited scope and is subject to many exceptions. For example, in a series of 12 hypotheticals, including allegations such as fraud in the sale of a house, 40–60% of the respondents believed that the attorney could disclose relevant information without the client’s permission.<sup>129</sup> Most respondents not only mistakenly assumed that the privilege is riddled with exceptions, fewer than a quarter of the laypersons indicated that expanding the exceptions “would cause them to be less willing to consult an attorney.”<sup>130</sup>

Another study was conducted in the late 1980s. The lead investigator was Professor Vincent Alexander.<sup>131</sup> Professor Alexander contacted corporate executives, in-house counsel, other corporate attorneys, and judges headquartered in Manhattan. Some of Professor Alexander’s findings cut in favor of sustaining a broad legal privilege. For example, “a solid majority” of the lawyers stated that in “their experience the privilege encourages candor on the part of corporate” executives.<sup>132</sup> Furthermore, three out of four high-ranking corporate executives shared that belief.<sup>133</sup> They also indicated that they were more cautious when the subject of the communication was a litigated matter.<sup>134</sup>

Yet, on balance, Professor Alexander concluded that the findings in his study are at odds with “the broad scope” that the privilege presently enjoys.<sup>135</sup> The executives’ responses indicated that in their interactions with counsel, they relied more heavily on their personal trust in the attorney rather than any assumption about the pertinent evidence law<sup>136</sup>—similar to the *Gutierrez* majority’s assertion that in communicating, spouses rely primarily on their trust in each other rather than the existence of a spousal privilege. In the executives’ mind, the key consideration was whether they had developed rapport with and trust in the attorney.<sup>137</sup> The executives added that even if the privilege were abolished or curtailed, they would continue to consult attorneys they had found to be trustworthy.<sup>138</sup> Thus, the modification of the

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126. *Id.* at 379.

127. *Id.* at 385.

128. *Id.* at 386.

129. *Id.* at 394.

130. *Id.* at 395.

131. Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN’S L.REV. 191 (1989).

132. *Id.* at 261.

133. *Id.* at 246, 261.

134. *See id.* at 246.

135. *Id.* at 200.

136. *See id.* at 248.

137. *See id.* at 264.

138. *See id.*

privilege would probably have little effect on the frequency of consultation.<sup>139</sup> Their oral communication with such attorneys would continue to be as candid as in the past,<sup>140</sup> but they might be more circumspect in written communication.<sup>141</sup>

Professor Alexander believed that these findings were especially salient. In the large corporations he contacted, counsel is virtually “omnipresent.”<sup>142</sup> In addition, in the case of in-house counsel, executives can consult for legal advice without either incurring any personal expense or increasing the corporation’s legal fees. Finally, the executives surveyed were sophisticated businesspersons more likely to be cognizant of the privilege than the average layperson. Professor Alexander opined that, if anything, the respondents would be biased in favor of overestimating the privilege’s impact on corporate activities.<sup>143</sup> However, their responses led Professor Alexander to conclude that the scope of the corporate legal privilege is definitely over-inclusive,<sup>144</sup> especially in its application to transactional work. He opined that there is serious question whether in-house counsel need any privilege at all<sup>145</sup> and that, in any event, there is a powerful case that an absolute privilege is unnecessary.<sup>146</sup>

In its opinion, the *Gutierrez* majority took it as a given that the medical and legal privileges pass muster under the instrumental criteria that it realistically applied to the spousal privilege. The majority is certainly to be commended for the rigorous, intellectually honest manner in which it identified the weaknesses in the instrumental case for the spousal privilege. The point, though, is that the majority erred in assuming that the two professional privileges it contrasted are readily distinguishable from the spousal privilege in terms of Wigmore’s criteria. If these empirical studies<sup>147</sup> are any indication, the world does not revolve around the legal system to the extent that the most ardent proponents of the instrumental theory believe. In many

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139. *See id.* at 248–49.

140. *See id.* at 264.

141. *See id.* at 263–64. In the words of Judge Posner, “[o]ne consequence” of the abolition of the privilege “would be to make clients much more guarded in what they told their lawyers.” Richard A. Posner, *An Economic Approach to the Law of Evidence* 68 (John M. Olin Law and Econ. Working Paper No. 66, 1999), [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1044&context=law\\_and\\_economics](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1044&context=law_and_economics) [<https://perma.cc/ALJ7-BFNL>]. The working paper was later republished as Richard Posner, *An Economic Approach to the Law of Evidence*, 51 *STAN. L. REV.* 1477 (1999).

142. Alexander, *supra* note 131, at 273.

143. *Id.* at 197–98.

144. *Id.* at 266–67.

145. *Id.* at 279.

146. *Id.* at 368, 384.

147. There have been more recent studies. IMWINKELRIED, *supra* note 93, § 5.2.2, at 419–21 (collecting the studies). These studies were conducted by an ABA Task Force on Attorney-Client Privilege, the Coalition to Preserve the Attorney-Client Privilege, the National Association of Criminal Defense Lawyers, and the Association of Corporate Counsel. *Id.* However, these studies are entitled to less weight. All of them were conducted by organizations of lawyers, not disinterested, academic researchers. All the respondents were attorneys, and in some cases the participants knew that they were completing the questionnaire as part of an effort to lobby Congress to restrict government agencies’ ability to seek privilege waivers from corporations that were under investigation. One of the fundamental principles of sound surveying is that the person being questioned should not know the purpose of the survey. *Gibson v. County of Riverside*, 181 F. Supp. 2d 1057 (C.D. Cal. 2002).

instances in which the currently broad professional privileges apply, the individual's concern about subsequent, judicially compelled disclosure would not deter the individual from consulting and confiding. The troubled individual seeking medical or legal advice is much more focused on the "here and now,"<sup>148</sup> the immediate problem that created the felt need for consultation. In a 2020 Queen's Bench decision involving legal advice privilege (the English analogue of American attorney-client privilege), Mrs. Justice Moulder matter-of-factly observed:

It is obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides.<sup>149</sup>

If we apply the instrumental criteria to those medical and legal privileges in the same, realistic fashion as the majority applied them to the spousal privilege, there are obvious weaknesses in the cases for recognizing those professional privileges. If we recognize only the instrumental paradigm, there is a strong case that there should be no medical privilege; and there are significant doubts whether, at least in certain settings such as corporate lawyering, the legal privilege should be as broad or absolute as it currently is. If we consistently apply the *Gutierrez* majority's commendably rigorous analysis to the application of the instrumental criteria to these professional privileges, we might reach the same conclusion that the majority reached with respect to the spousal privilege: it is time to abolish them or significantly curtail their scope. The question then naturally arises: should the courts recognize an alternative, humanistic rationale to supplement the instrumental paradigm and bolster the protection of privacy in the United States? Part III argues that the courts should do so and that if they did so, they could justifiably accord relationships such as marriage, doctor-patient, and attorney-client the privacy protection that the public expects.

### III. A CRITICAL EVALUATION OF THE *GUTIERREZ* MAJORITY'S REJECTION OF THE PROPOSED HUMANISTIC PARADIGM

#### A. The Growing Demand for the Protection of Privacy

As the Introduction noted, some have proclaimed that the protection of privacy is "the major social issue of the information society."<sup>150</sup> That proclamation is more than mere rhetoric. It is impossible to ignore the numerous signs that the American citizenry is insisting on greater protection for its privacy. In its opinion, the *Gutierrez* majority stated that in the United States today spouses may not be as

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148. Edward Imwinkelried, *Court Ducks Larger Privilege Issues Again*, NAT'L L. J., July 20, 1998, at A 22.

149. *PJSC Tatneft v. Bogolyubov* [2020] EWHC 2437, 23 (Comm.). The court borrowed the language from Lord Scott's famous opinion in *Three Rivers* (No. 6) [2005] 1 AC 610, at [34].

150. Randolph J. May, *When Traditional Civil Liberties Advocates Start Lobbying for Privacy, Who Will Make Sure That Speech Remains Free?*, LEGAL TIMES, Apr. 30, 2001, at 62.

concerned about privacy as they were in the earlier agrarian society.<sup>151</sup> If that statement has any truth in the spousal setting, it certainly does not present the predominant modern sentiment about the protection of privacy.

The law has long conferred various forms of privacy protection. For example, it is well settled that a patient can recover in tort for the breach of confidence by the patient's physician,<sup>152</sup> psychiatrist,<sup>153</sup> or psychologist.<sup>154</sup> In addition, most jurisdictions safeguard privacy by recognizing such torts as unreasonable intrusion, false light in the public eye, and public disclosure of private facts.<sup>155</sup> Forty states permit recovery for public disclosure of private facts even if the facts are true.<sup>156</sup>

If anything, today the public demand for legal protection of privacy is more insistent than ever. Poll after poll documents that the American public is extremely concerned about the potential loss of privacy. One commentator remarked that "Americans are arguably more concerned about privacy [today] than ever before . . ."<sup>157</sup> In his classic work, *The Limits of Privacy*, Amitai Etzioni reported that in a Harris-Westin poll 88% of the respondents expressed concern about the threats to their personal privacy.<sup>158</sup> In a poll commissioned by *USA Today*, 53% of American adults said that they are "extremely concerned with their ability to keep their information private," and 51% added that the current level of legal protection for privacy is inadequate.<sup>159</sup> The American polls consistently reveal high levels of public concern about privacy.<sup>160</sup> In a Harris poll, 76% of the respondents stated that they favored adding privacy to the list of rights expressly accorded constitutional status.<sup>161</sup> Eleven states have amended their state constitutions to include an express, general constitutional right to privacy.<sup>162</sup>

Leading law firms have responded to this heightened level of public concern by, for the first time, creating practice groups devoted to privacy issues.<sup>163</sup> Legislatures have also taken heed. Legislators realize that their constituents are demanding more extensive formal legal protection for their privacy. In one year

151. See *State v. Gutierrez*, 482 P.3d 700, ¶ 26 (citing 25 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5572 at 538 (1989)), clarified by 2021-NMSC-008.

152. 1 IMWINKELRIED, *supra* note 93, § 1.3.2, at 34–35 n. 53 (collecting cases).

153. See *Mrozinski v. Pogue*, 205 Ga.App. 731, 423 S.E.2d 405 (Ga. Ct. App. 1992).

154. 1 IMWINKELRIED, *supra* note 93, § 1.3.2, at 35–36 n. 55 (collecting cases).

155. See *id.* § 5.3.3, at 516–25 (collecting cases).

156. See *id.* § 5.3.3, at 519–20 n. 531 (collecting cases).

157. Evan P. Schultz, *Shrouded Privacy*, LEGAL TIMES, June 25, 2001, at 74–95; see also Susanne M. Jones, *Epilogue*, in BALANCING THE SECRETS OF PRIVATE DISCLOSURES 301, 301 (2000) ("more concerned . . . than ever before").

158. AMITAI ETZIONI, THE LIMITS OF PRIVACY 1, 6 (1999); see also Tammy Renée Daub, *Surfing the Net Safely and Smoothly: A New Standard for Protecting Personal Information from Harmful and Discriminatory Waves*, 79 WASH. UNIV. L. Q. 913, 914 (2001) (discussing a 1998 Harris poll).

159. See Jedediah Purdy, *An Intimate Invasion*, USA WEEKEND, June 30–July 2, 2000, at 6–7.

160. Tim Dixon, *Valuing Privacy: An Overview and Introduction*, 24 UNIV. N.S.W. L. J. 239, 241 (2001).

161. STEPHEN GOODE, THE RIGHT TO PRIVACY 3 (1983).

162. 1 IMWINKELRIED, *supra* note 93, § 5.3.3., at 545–49.

163. *Id.* § 1.1, at 12.

alone, more than 300 bills were introduced in 35 different state legislatures to protect the confidentiality of medical records.<sup>164</sup> Privacy bills have not only been introduced but, more importantly, they have been passed in large numbers. Numerous state legislatures have taken action,<sup>165</sup> including the adoption of such sweeping measures as the California Privacy Rights Act<sup>166</sup> and the Illinois Biometric Information Privacy Act.<sup>167</sup> For its part, Congress has also joined in, enacting a wide range of legislation such as the Driver's Privacy Protection Act, the Right to Financial Privacy Act, the Family Educational Rights and Privacy Act, the Video Tape Privacy Protection Act, the Electronic Communications Privacy Act, and the Federal Nursing Home Reform Act.<sup>168</sup> Indeed, it is clear that "[p]rivacy laws have never seemed stronger."<sup>169</sup> It is a gross understatement to say that the American public favors greater legal protection for their privacy.

### **B. The Strength of the Case That the Adoption of the Humanistic Rationale for Evidentiary Privileges is an Appropriate Way of Providing More Protection for Privacy**

The question becomes whether the recognition of evidentiary privileges for relations such as spousal, legal, and medical is an appropriate method of conferring such protection. On the one hand, this article does not argue that constitutional law mandates that the courts and legislatures do so. The courts have repeatedly rejected the contention that the attorney-client privilege is of constitutional dimension.<sup>170</sup> On the other hand, this article urges that properly circumscribed doctrines, such as the attorney-client and spousal privileges, effectively safeguard and promote important constitutional values.

#### *i. The Constitutional Protection for Autonomous Spousal Decision-Making*

In its opinion, the *Gutierrez* majority makes short shrift of the argument that a humanistic theory can be based on autonomy.<sup>171</sup> However, at a deeper level than doctrine, the protection of personal autonomy is a fundamental constitutional

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164. See *Uneven State Medical Records Laws Offer Potential Pitfalls for Health Plans*, 68 U.S.L.W. 2291 (Nov. 23, 1999).

165. See IMWINKELRIED, *supra* note 93, § 5.3.3, at 528–30 nn. 543–44 (collecting cases).

166. See *id.* § 12.3.3, at 2315–16.

167. See generally *Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617 (7th Cir. 2020), *amended by*, No. 20-1443, 2020 U.S. App. LEXIS 20468 (7th Cir. June 30, 2020).

168. See IMWINKELRIED, *supra* note 93, § 5.3.3., at 531–32 n. 547 (collecting cases).

169. Ari Ezra Waldman, *Privacy Law's False Promise*, 97 WASH. U. L. REV. 773 (2020).

170. *United States v. Carter*, 429 F. Supp. 3d 788, 890 (D. Kan. 2019); *Skinner v. McLemore*, 551 F. Supp. 2d 627, 645 (E.D. Mich. 2007); *People v. Delgado*, 2 Cal. 5th 544, 561, 389 P.3d 805, 214 Cal. Rptr. 3d 223 (2017). For that matter, on numerous occasions the courts have held that an accused's constitutional right to present critical, demonstrably reliable evidence surmounts a statutory or common-law privilege. See EDWARD J. IMWINKELRIED & NORMAN M. GARLAND, *EXCULPATORY EVIDENCE* Ch. 10 (5th ed. 2021). For example, accused have successfully invoked this theory to trump the attorney-client privilege (*id.* at § 10-5.a (collecting cases)), the medical privilege (*id.* at §10-5.c (collecting cases)), the psychotherapy privilege (*id.* at § 10-5.d (collecting cases)), and the spousal privilege (*id.* at § 10-5.f (collecting cases)).

171. *State v. Gutierrez*, 2021-NMSC-008, ¶ 20, 482 P.3d 700, 707.

value.<sup>172</sup> Since the time of the Greeks, one of the most important contributions of Western political thought has been the recognition of a distinction between the public and private realms.<sup>173</sup> In the private realm, the individual has a right to autonomy. “Respect for the . . . autonomy of the individual is a value universally celebrated in free societies and uniformly repressed in totalitarian and authoritarian societies.”<sup>174</sup> Justice Blackmun wrote that the citizen is entitled to “a limited [private] sphere of individual autonomy.”<sup>175</sup> In Justice O’Connor’s words, that sphere is the critical “realm of personal liberty.”<sup>176</sup> Within that realm, the individual is generally free to

172. *Pierce v. Society of Sisters*, 268 U.S. 510, 534–535 (1925).

173. See RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAWS* 3 (1st ed. 1999).

174. *People v. Weber*, 217 Cal. App. 4th 1041, 1054, 159 Cal. Rptr. 3d 228, 240 (Cal. Ct. App. 2012).

175. ELLEN ALDERMAN & CAROLINE KENNEDY, *THE RIGHT TO PRIVACY* 62 (1995) (quoting *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 432 n.11 (1989)).

176. See *id.* at 63 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)). In *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022), the Supreme Court overturned *Roe v. Wade*, 410 U.S. 113 (1973) and *Casey*, 505 U.S. 833, along with it. However, the Court has classified many other rights, including several related to marriage, as falling within this realm of protected autonomy. See, e.g., *Pierce*, 268 U.S. 510, 534–535. The lower courts have extended this realm to numerous rights. See *Abigail Alliance for Better Access to Dev. Drugs v. von Eschenbach*, 469 F.3d 129, 139 (D.C. Cir. 2006) (a right to access to potentially lifesaving investigational drugs); *Alford v. City of N.Y.*, 413 F. Supp. 3d 99, 114 (E.D.N.Y. 2017) (“Choices about marriage, family life, and the upbringing of children. . . .”); *Doe v. Ohio State Univ.*, 136 F. Supp. 3d 854, 868 (S.D. Ohio 2016) (“the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to contraception, to bodily integrity, . . . and possibly the right to refuse unwanted life-saving medical treatment”); *Richmond Med. Ctr. For Women v. Hicks*, 301 F. Supp. 2d 499, 515 (E.D. Va. 2004) (a “constitutionally protected right[] to . . . choose the type of medical care” that he or she receives); *Cal. Advocates Nursing Home Reform v. Smith*, 38 Cal. App. 5th 838, 862, 866, 251 Cal. Rptr. 3d 636, 654, 658 (Cal. Ct. App. 2019) (the right to refuse medical treatment, even treatment necessary to sustain life); *Burton v. State*, 49 So. 3d 263, 265 (Fla. App. 2010) (the right to refuse medical treatment).

Perhaps more importantly, at several points Justice Alito’s lead opinion overruling *Roe* goes to great lengths to emphasize that the decision will not undermine these other rights. See *Dobbs*, 142 S. Ct. 2228. The opinion states that the “rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage” are “fundamentally different” from the claimed constitutional right to abortion, since only the latter right involves the destruction of fetal life. *Id.* at 2243. The opinion lists a number of rights recognized in previous Supreme Court decisions: “the right to marry a person of a different race, . . . the right to marry while in prison, . . . the right to obtain contraception, . . . the right to reside with relatives, . . . the right to make decisions about the education of one’s children, . . . the right not be sterilized without consent, . . . the right in certain circumstances not to undergo involuntary surgery [or] forced administration of drugs, . . . the right to engage in private, consensual sexual acts, . . . and the right to marry a person of the same sex.” The opinion asserts that all of these rights are “sharply distinguish[ed]” from abortion because only abortion destroys potential life. The opinion declares that overruling *Roe* will not undermine those rights in any way. *Id.* at 2257–58. On several points, the opinion reiterates its limited scope of the ruling overruling *Roe*. The opinion explicitly states that “Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.” *Id.* at 2277–78. The opinion repeatedly notes that the abortion question is unique because it involves the protection of fetal life. *Id.* at 2241, 2279, 2280. Of course, critics will contend that despite its protestations to the contrary, the opinion will encourage attacks on the other constitutional rights. That contention is probably correct. Justice Thomas’ separate opinion in *Dobbs* indicates his view that the result in *Dobbs* calls some of those other rights into question. *Id.* at 2300 (Thomas, J., concurring). However, at least in the short term the proponents of those other rights can quite properly point out that: (1) the lead opinion expressly states that the ruling is not intended to withdraw constitutional protection for those other rights; and (2) the opinion repeatedly states the basis on which, according to the opinion, those rights are distinguishable

make autonomous<sup>177</sup> choices.<sup>178</sup> As an autonomous being, the individual has a presumptive right to choose the elements of his or her own life plan and define the good life for himself or herself.<sup>179</sup>

The individual's right to autonomy is not merely political or philosophic rhetoric. At a doctrinal level, in certain areas, the courts have squarely held that there is a constitutionally protected right to privacy in decisional autonomy. As we have seen, although the *Gutierrez* majority implicitly assumed that the medical privilege satisfies Wigmore's instrumental criteria, in truth, that assumption is highly debatable. The majority takes for granted that a medical privilege is desirable; but if the law is to recognize the privilege, the privilege needs a justification other than its satisfaction of the instrumental theory. On numerous occasions, the courts have recognized that individuals have a constitutionally protected right to make autonomous decisions about medical treatment.<sup>180</sup> Whatever a person's life plan, he or she needs physical and mental health to pursue their life preference choices. In this context, the humanistic theory can serve as a necessary supplement to the instrumental paradigm to uphold at least a limited medical privilege.

Similarly, while the *Gutierrez* majority found the spousal privilege wanting under the instrumental paradigm, the Supreme Court has repeatedly and forcefully declared that spouses have a constitutionally protected realm of autonomy.<sup>181</sup> The substate family unit enjoys autonomy in a free society<sup>182</sup> in part because it is a natural "extension of [the] personal autonomy" of the individual spouses in the unit.<sup>183</sup> The courts have constitutionalized a degree of decisional privacy in this area of life.<sup>184</sup> As early as 1923, the Supreme Court announced that the liberty safeguarded by Fourteenth Amendment's Due Process Clause protects the rights "to marry, establish a home and bring up children . . ."<sup>185</sup> Two years later, the Court elaborated that parents have a constitutionally protected liberty to "direct the upbringing and

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from the right to an abortion. The dissenters certainly would not support the abrogation of any of the autonomy-based rights.

177. See generally DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, *ECONOMIC ANALYSIS AND MORAL PHILOSOPHY* 123–125 (1996).

178. See generally John Rawls, *The Right and the Good Contrasted*, in *LIBERALISM AND ITS CRITICS* 38–44 (Michael J. Sandel ed., 1984).

179. See Joseph Kupfer, *Privacy, Autonomy, and Self-Concept*, 24 *Am. Phil. Q.* 81, 82 (1987).

180. In *re* Quinlan, 70 N.J. 10, 355 A.2d 647, 663 (N.J. 1976) (the United States Supreme Court's precedents have fashioned "an unwritten constitutional right of privacy. . . . Presumably this right is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances"), *cert. denied*, 429 U.S. 922 (1976); Susan Wolf, *Toward a Systemic Theory of Managed Care*, 35 *Hous. L. Rev.* 1631, 1631–32, 1663 (1999) (in 1914, Justice Cardozo pronounced that every competent adult "has a right to determine what shall be done with his own body"; "the patient [has the] legal right to decide what happens to his or her body. . . .").

181. See *IMWINKELRIED*, *supra* note 93, § 6.2.1b, at 638–40 (collecting Supreme Court decisions supporting spousal decisional autonomy).

182. See 25 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5594, at 773 (1989).

183. See *id.* at § 5572, at 549.

184. See *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061 (6th Cir. 1998); *State v. Pilcher*, 242 N.W. 2d 348 (Iowa 1976); STEPHEN GOODE, *THE RIGHT TO PRIVACY* 29 (1983); Jed Rubenfeld, *The Right to Privacy*, 102 *Harv. L. Rev.* 737, 740–47 (1989).

185. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).



education of children under their control.”<sup>186</sup> More recently, the Court declared that under substantive due process, there is a general right to “marital privacy.”<sup>187</sup> More specifically, the Court has confirmed that spouses have a right to special “constitutional protection” to make independent decisions “relating to [such matters as] marriage, procreation, contraception, family relationships, and child rearing and education.”<sup>188</sup> The Court reaffirmed the constitutional protection for marital autonomy in its 2015 decision on same-sex marriage.<sup>189</sup>

ii. *The Role of a Spousal Privilege in Enhancing Intelligent, Independent Decision-Making in the Sphere of Marital Autonomy*<sup>190</sup>

In 1986, Professor Joseph Raz released his insightful work, *The Morality of Freedom*.<sup>191</sup> The common perception is that government action is the enemy of personal freedom in a democratic society. Yet the thesis of Raz’s text is that in a liberal democracy, society’s obligation to honor the person’s privacy is not limited to respecting the person’s negative right to be let alone. Rather, as a normative proposition: a liberal democratic government has a positive duty<sup>192</sup> to promote<sup>193</sup> autonomy.<sup>194</sup> In Raz’s view, a liberal democratic society ought to create an environment<sup>195</sup> that is positively supportive of autonomy.<sup>196</sup> As Justice Brandeis wrote in *Olmstead v. United States*,<sup>197</sup> government should not merely refrain from obstructing its citizens’ pursuit of their personal visions of the good life; instead, government ought to endeavor to “secure conditions favorable to the pursuit of happiness” by citizens making autonomous decisions and choices.

The issue then arises: is the creation of an evidentiary privilege an appropriate positive step that government should take to enhance personal autonomy, at least in the areas of life, such as marriage, in which decisional autonomy is

186. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

187. *See* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

188. *See* *Paul v. Davis*, 424 U.S. 693, 713 (1976); Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 738, 783–87, 792–94, 797–802 (1989) (“[T]he three principal areas in which the right to privacy has been applied [by the Supreme Court are]: child-bearing (abortion and contraception), marriage (miscegenation laws, divorce restrictions, and so on), and education of children. . . .”); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 386 (1985). *See* ALDERMAN & KENNEDY, *supra* note 175.

189. *See* *Obergefell v. Hodges*, 576 U.S. 644 (2015). *See* ALDERMAN & KENNEDY, *supra* note 175.

190. This part of the article draws heavily on EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 5.3.3 (4th ed. 2021).

191. *See* JOSEPH RAZ, *THE MORALITY OF FREEDOM* 409 (1986); Jeremy Waldron, *Autonomy and Perfectionism in Raz’s Morality of Freedom*, 62 S. CAL. L. REV. 1097, 1104 (1989).

192. *See id.* at 1121, 1124–27.

193. *See id.* at 1120; Donald H. Regan, *Authority and Value: Reflections on Raz’s Morality of Freedom*, 62 S. Cal. L. Rev. 1039, 1055 (1989).

194. *See generally* Joseph Raz, *Liberalism, Autonomy, and the Politics of Neutral Concern*, 7 Midwest Stud. in Phil. 89, 96, 101–02 (1982).

195. RAZ, *supra* note 191, at 391, 408, 415; *Id.* at 116. *See also* Waldron, *supra* note 191, at 1102, 1115, 1119, 1121, 1123.

196. Waldron, *supra* note 191, at 1121.

197. GOODE, *supra* note 161, at 15 (quoting 277 U.S. 438 (1928)).

constitutionally protected? The answer is “yes” because doing so helps the individual resolve “the dilemma of autonomy.”<sup>198</sup>

On the one hand, as a rational agent with cognitive ability,<sup>199</sup> the individual obviously wants to make intelligent, informed life preference choices in his or her constitutionally protected zone. To learn all the options open to him or her, the individual often needs to consult third parties.<sup>200</sup> Third parties frequently possess information that the individual needs to make informed choices.<sup>201</sup> Consider the two examples cited by the *Gutierrez* majority, namely, the medical and legal privileges. To decide whether to make a certain medical choice, individuals may have to speak with a doctor.<sup>202</sup> The Supreme Court has famously remarked that individuals “require[] the guiding hand of counsel” in the legal system.<sup>203</sup> The medical and legal contexts are not the only setting in which the individual may need to consult a third party to make an intelligent choice. As Raz observed, the same holds true in the spousal setting.<sup>204</sup> Spouses are capable of self-sacrifice and choosing altruistic preferences.<sup>205</sup> Precisely because spouses are the objects of each other’s love, the spouse may choose the good of the other spouse as his or her own preference.<sup>206</sup> The difficulty is that even when the family relationship is close, it may be hard for one spouse to surmise the other spouse’s desires.<sup>207</sup> Thus, as in the case of medical and legal consultants, the spouse may need to engage in intimate conversation<sup>208</sup> to make an intelligent decision.

On the other hand, the dilemma arises because, as a human being with volitional ability,<sup>209</sup> the individual risks being coerced or manipulated during the consultation.<sup>210</sup> One obvious possibility is physical coercion,<sup>211</sup> but that does not exhaust the possibilities.<sup>212</sup> Without employing physical restraint, the consultant might coerce<sup>213</sup> the individual to act against his or her will.<sup>214</sup> The consultant could employ psychological or economic threats as instruments of coercion. A third

198. IMWINKELRIED, *supra* note 93, at § 5.3.3(c)(5), at 489.

199. *See generally* HAUSMAN & MCPHERSON, *supra* note 177, at 64 (the homo rationalis of economics).

200. *See generally* RAZ, *supra* note 191, at 204–06, 372–76.

201. *See* GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 45–46, 55 (1988).

202. *See generally* Regan, *supra* note 193, at 1076; Waldron, *supra* note 191, at 1109.

203. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

204. *See* RAZ, *supra* note 191, at 369.

205. *See generally* HAUSMAN & MCPHERSON, *supra* note 177, at 52–53.

206. *See generally* MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 31, 33–34, 69, 169 (2d ed. 1998).

207. *See generally* *Id.* at 54.

208. *See generally* ALAN F. WESTIN, *PRIVACY AND FREEDOM* 37 (1st ed. 1967).

209. MORTIMER J. ADLER, *SIX GREAT IDEAS* 141–42, 152, 164 (1981) (discussing freedom of will).

210. Lubor C. Velecky, *The Concept of Privacy in PRIVACY* 13, 31 (J.B. Young ed., 1978).

211. *See generally* RICHARD F. HIXSON, *PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT* 31 (1987).

212. *See* GOODE, *supra* note 161, at 21–22.

213. *See* Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. Rev. 315, 341 (1987); *see generally* Raz, *supra* note 194, at 110.

214. *See generally* Raz, *supra* note 194, at 111.

possibility is subtler manipulation.<sup>215</sup> When a third party resorts to manipulation, the third party may hold back information that shades their advice to the individual.<sup>216</sup> The manipulation can distort the individual's understanding of the merits of the choice.<sup>217</sup> The manipulation can deceive the individual into thinking that he or she is selecting their own authentic desires, distort the manner in which the individual chooses, and cause the individual to make a choice they otherwise would not have made.<sup>218</sup> In short, the essence of the dilemma is that the process of consulting to enhance the intelligence of his or her choice can imperil the independence of the individual's choice. The substantive law of fiduciary relationships and undue influence reflects the law's recognition of the moral intuition of that peril.<sup>219</sup>

Again, Raz's thesis is that a democratic society should take positive steps to protect and enhance the individual's personal autonomy. Society's legal system can adopt measures to enable the individual to trust that, in the process of consulting, his or her autonomy and independence will not be compromised.<sup>220</sup> One such measure is creating an evidentiary privilege for consultations in constitutionally protected areas of decision-making, such as family choices. Various writers have used different expressions to characterize the requisite type of protection: the creation of protected circles, enclaves, islands, shelters, spaces, spheres, or zones for private communication.<sup>221</sup> Whatever terminology is used, the intent is to enable the consultant to feel free to advise<sup>222</sup> the individual without creating fear<sup>223</sup> of social sanction.<sup>224</sup>

The instrumental theory is inadequate in part because it focuses on the state of mind of only the layperson deciding whether to make the disclosure to the confidant. The state of mind of the confidant is also salient. It is not simply a question of assuring the individual seeking advice that the consultant will not divulge his or her statements. The consultant may fear the consequences of the revelation of their advice; that fear can motivate the consultant to distort or withhold information during the consultation. Whether the consultant is a doctor, lawyer, or spouse, he or she may be afraid that the disclosure of the advice they give will expose them to disapproval by other doctors, lawyers, family members, the media, or the public. In the family setting, that fear could be acute; a spouse might be terrified at the possible negative reaction of another, beloved family member, such as a mother or grandfather.<sup>225</sup> The consultant should be at liberty to "think aloud" about all the possible courses of

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215. *See id.* at 110.

216. *See RAZ, supra* note 191, at 377.

217. *See Waldron, supra* note 191, at 1146.

218. *See RAZ, supra* note 191, at 377–78.

219. IMWINKELRIED, *supra* note 93, § 5.3.3(c)(7), at 495–96, § 5.3.3(c)(8), at 499–500.

220. *See Smith, supra* note 86, at 24, 26.

221. IMWINKELRIED, *supra* note 93, at 509 (citing the various texts and articles).

222. *See WESTIN, supra* note 208, at 38.

223. *See id.* at 34; HIXSON, *supra* note 211, at 65.

224. *See WESTIN, supra* note 208, at 35, 43.

225. One can easily imagine that fear if the spousal conversation related to such delicate subjects as mental or physical health or possible divorce. In some cases, the communication might well prove to be relevant in subsequent litigation, such as a custody battle or an involuntary institutionalization proceeding.

action open to the individual.<sup>226</sup> The consultant must be free to broach controversial,<sup>227</sup> unpopular,<sup>228</sup> or divergent<sup>229</sup> views even when those views are at odds with dominant social, professional, or family sentiment.<sup>230</sup> If the consultant thought that even over the individual's objection, the consultant could be forced to divulge the advice they had given the individual, the consultant could be at least unconsciously tempted to distort their advice and manipulate the individual's choice. In contrast, if the consultant can be confident that the legal system will shield the advice and confidences, it is more probable that the end result, the individual's ultimate choice, will be authentically independent as well as informed. An evidentiary privilege may not be of constitutional dimension, but if it significantly increases the likelihood of attaining that end result, the privilege will directly promote the fundamental constitutional value of personal autonomy.

### CONCLUSION

The purpose of this article is not to sound a death knell for the instrumental or utilitarian rationale for privileges. Quite to the contrary, this article acknowledges that in many cases the instrumental rationale is an adequate basis for sustaining a privilege claim. Moreover, the article applauds the realistic, unromantic fashion in which the *Gutierrez* majority applied the utilitarian criteria to the spousal privilege. This article argues that the humanistic theory can supplement—not entirely supplant—the instrumental theory. To be sure, in some cases the instrumental theory does not require supplementation. By way of example, suppose that in major litigation, the attorney is preparing the client for the client's deposition. Moreover, assume that the client is the only person who knows certain facts that could easily be fatal to the client's claim or defense. It is entirely plausible in that situation that the client would withhold vital information even from his or her own attorney but for the assurance provided by the existence of an absolute attorney-client privilege. On these facts, the instrumental paradigm is an adequate basis for upholding a legal privilege claim.

However, in other cases—even in cases involving professional privileges such as the medical and legal ones—it is clear that if the circumstances are subjected to the same level of critical scrutiny which the *Gutierrez* majority brought to bear on the spousal privilege, many professional privilege claims cannot be justified solely on the basis of the instrumental rationale. Common sense virtually dictates the conclusion that a patient in agonizing pain will confide in his or her physician

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226. See WESTIN, *supra* note 208, at 38.

227. See *id.* at 43.

228. See CHARLES FRIED, AN ANATOMY OF VALUES 141 (1970).

229. See WESTIN, *supra* note 208, at 45.

230. See *id.* at 24; see also *Conant v. McCaffrey*, No. 97-139, 2000 U.S. Dist. LEXIS 13024, ¶¶ 40, 48 (N.D. Cal. Sept. 7, 2000) (Issuing a permanent injunction against government threats to revoke a doctor's license for recommending that a patient use marijuana. The court commented that "[i]n some cases . . . it will be the professional opinion of doctors that marijuana is the best therapy or at least should be tried. If such recommendations could not be communicated, then the physician-patient relationship will be seriously impaired. Patients need to know their doctors' recommendations." The court issued an injunction at a time when the state had legalized neither recreational nor medical use of marijuana.), *aff'd sub nom.* *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2000).

without regard for a medical privilege. The empirical studies cited above indicate that, at least in certain settings, such as corporate lawyering, the privilege should not be as impenetrable as it currently is. After all, if an employee has limited personal liability exposure in a given case, the employer's direct order that the employee divulge information to the attorney representing the employer in the case should be all the incentive the employee needs to consult with and confide in the attorney. The employee realizes that the consequences of a refusal to obey the order are likely to be termination or demotion. In such cases, an intellectually honest court will need to turn to the humanistic theory to uphold a privilege claim.

However, even if the court is willing to invoke the humanistic theory, the outcome may not be exactly the same as it would have been if the court had mechanically applied the instrumental paradigm. Wigmore believed that any privilege that passed muster under his criteria had to be absolute in character—not in the sense that it would not admit because of exceptions but rather that it could not be defeated by an ad hoc showing of a compelling need for the information in a specific case.<sup>231</sup> If the individual is acutely afraid of subsequent, judicially compelled disclosure, he or she must have substantial confidence that, at a later point, a court will honor the privilege. The individual cannot have that level of confidence if they know that months or years later a judge can override the privilege on the basis of an ad hoc decision that a litigant's need for the information trumps the privilege. However, the humanistic theory is based on the right to autonomy; and in liberal democratic theory, few rights are absolute.<sup>232</sup> Even the most ardent proponents of privacy rights concede that those rights should not be classified as absolute.<sup>233</sup> Similarly, even in the states which have enshrined a right to privacy in their state constitutions, the courts have held that the right is qualified or conditional.<sup>234</sup>

Further, the reach or scope of the privilege may be smaller under the humanistic rationale. The conventional wisdom under the instrumental paradigm is that the privilege extends to any communication incident to the relationship.<sup>235</sup> In contrast, the humanistic paradigm is calculated to protect communications related to a constitutionally protected zone of decisional privacy. Of course, the individual and the confidant need some "breathing space" for full, effective communication.<sup>236</sup> If the confidant is going to arm the individual with the information needed for an

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231. See generally *Admiral Ins. Co. v. United States Dist. Ct. for the Dist. of Ariz.*, 881 F.2d 1486 (9th Cir. 1989); *Mine Safety Appliance Co. v. North River Ins. Co.*, 73 F. Supp. 3d 544, 571 (W.D. Pa. 2014); *United States v. Grice*, 37 F. Supp. 2d 428, 432 n. 13 (D.S.C. 1998). See also *United States v. Gonzalez*, 669 F.3d 974, 981 (9th Cir. 2012) ("[p]rivilege cannot be overcome by a showing of need. . . .") (quoting *Admiral Ins. Co.*, 881 F.2d at 1494-1495), *amended*, No. 10-10310, 2012 U.S. App. LEXIS 2900 (9th Cir. Feb. 13, 2012).

232. See Thomas G. Krattenmaker, *Interpersonal Testimonial Privileges under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L. J. 613 (1976); Thomas G. Krattenmaker, *Testimonial Privileges and the Rights of Privacy and Speech*, 62 GEO. L. J. 61 (1973). The only absolute right in our constitutional scheme may be the right to believe. See *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); *McBride v. Shawnee County, Kan. Court Serv.*, 71 F. Supp. 2d 1098, 1100 (D. Kan. 1990); Smith, *supra* note 86, at 34.

233. See generally WESTIN, *supra* note 208, at 25; DWORKIN, *supra* note 201, at 115.

234. See LMWINKELRIED, *supra* note 93, § 5.4.4.a, at 604 n. 157 (collecting cases).

235. See *id.* at § 6.11.

236. See generally WESTIN, *supra* note 208, at 350.

intelligent, informed choice, the privilege should not be strictly limited to the individual's request for advice about fundamental life preference choices; rather, the privilege ought to extend to the confidant's statements conveying the required advice and information. Nevertheless, the coverage of the privilege is likely to be narrower than under the instrumental theory.

As the Introduction stated, the majority decision in *Gutierrez* raises profound questions about the future of evidentiary privileges in the United States. Should we apply the instrumental criteria to all privileges in the same realistic manner as the majority evaluated their application to the spousal privilege? If we do, privilege claims in many cases—even claims of professional privilege—will likely fail; and the legal protection for privacy will shrink. Yet, the public demand for privacy protection has never been as insistent; and if that protection is to be secured, we shall have to find an alternative paradigm to supplement the dominant instrumental model. One candidate model is the humanistic theory premised on constitutionally protected decisional autonomy. That model is attractive not only because it promotes the fundamental value of autonomy but also because it speaks to a moral question at the heart of liberal democracy: “The question is not really ‘what are the empirical results of permitting this witness to be silent?’; it is ‘what kind of people are we . . .’”<sup>237</sup> Should government be content to merely refrain from violating personal autonomy, or, following Raz's urging, should government take positive steps to invigorate autonomy? And, if the latter is preferable, in Wigmore's words, which social relations should government “sedulously foster[]”<sup>238</sup> If Raz's approach is sound and it is settled that autonomous decision-making in the marital enclave enjoys a measure of constitutional protection, there is a powerful, humanistic argument that the spousal relation deserves privilege protection.

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237. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5422.1, at 407 (Supp. 2000).

238. WIGMORE, *supra* note 3, § 2285, at 527–28.