

# Rationalizing a Spousal Confidential Communications Privilege Fit for the Twenty-First Century

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## INTRODUCTION

In mid-2019, the New Mexico Supreme Court abolished New Mexico's spousal confidential communication privilege through its decision of *State v. Gutierrez*, becoming the first and only state to do so.<sup>1</sup> When explaining its decision to abandon the spousal confidential communications privilege, the New Mexico Supreme Court stated that the traditional justifications for the privilege of promoting marital harmony and protecting privacy between spouses no longer withstand scrutiny in modern society.<sup>2</sup> In so declaring, the court, in essence, proclaimed that the spousal confidential communications privilege serves no purpose in the modern United States.

In 2020, shocked by the court's unilateral decision to abolish such an "established privilege," defendant Gutierrez, supported by amicus briefs, filed a motion for rehearing.<sup>3</sup> The court granted the motion, agreeing that "[t]he Court should hear the opinions [of] civil litigants and other jurists before the wholesale abolition of an established privilege."<sup>4</sup> After considering the information presented before them, the court withdrew its 2019 decision and reinstated the privilege, noting that the abolition or modification of the spousal confidential communications privilege "should be the subject of comprehensive study and robust public discussion."<sup>5</sup> To determine the future fate of the state privilege, the court referred it to the New Mexico Rules of Evidence Committee ("Rules Committee").<sup>6</sup>

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1. 482 P.3d 700, 711 (N.M. 2019) [hereinafter *Gutierrez*].

2. *Id.*

3. *State v. Gutierrez*, 2020-NMCA-045, ¶ 109, 2020 N.M. App. LEXIS 25, 472 P.3d 1260 (N.M. Nov. 5, 2020) (appealing to be heard regarding the abolition of the spousal confidential communications privilege) [hereinafter *Rehearing*].

4. *Id.* (alteration in original).

5. *Id.* ¶¶ 110–11.

6. *Id.* ¶ 111. Annotated in a compiler's note, the *Current New Mexico Rules Annotated* states as of June 2021:

In *State v. Gutierrez*, 2021-NMSC-008, filed on August 30, 2019, the New Mexico Supreme Court prospectively abolished the spousal communication privilege in New Mexico and withdrew Rule 11-505 NMRA from the Rules of Evidence. On June 26, 2020, the New Mexico Supreme Court granted a motion for rehearing, and on November 5, 2020, issued its Order on Rehearing, No. S-1-SC-36394, in which the Court retracted the ruling in the original majority opinion that abolished the spousal communications privilege, reinstated the rule for all cases pending or filed as of June 26, 2020, and referred to the Rules of Evidence Committee the matter of whether Rule 11-505 should be amended or abolished or should remain unchanged.

N.M.R. Ann. 11-505, <https://nmonesource.com/nmos/nmra/en/item/5665/index.do#!b/11-101>.

The New Mexico Supreme Court's initial abolition of the spousal confidential communications privilege called into question the need for its continued existence. As the *Gutierrez* decision highlights, the privilege has led a controversial life, and the court's referral to the Rules Committee presents an excellent opportunity to take a deeper look at the privilege's current usefulness.

The spousal confidential communications privilege is one of the few testimonial privileges recognized by the U.S. legal system. In general, testimonial privileges give a person a right to refuse to disclose or prevent others from disclosing information to a tribunal that would otherwise be able to compel and make use of the information's disclosure.<sup>7</sup>

Throughout history these testimonial privileges have worked to signify the weight society imputes upon certain relationships by insulating these special relationships from being compelled to testify in court. The marital privilege—the spousal confidential communications privilege and its counterpart, the adverse testimonial privilege<sup>8</sup>—are a result of the significance society places upon the marital relationship. And while society's concept of marriage has evolved since the privileges' conceptions, the U.S. public still places significant value upon the institution of marriage.<sup>9</sup> Thus, entirely abolishing the spousal confidential communications privilege<sup>10</sup> might be too hasty of a decision, as argued by the amici in the *Gutierrez* rehearing.<sup>11</sup>

As the New Mexico spousal confidential communications privilege heads to the Rules Committee for consideration, other states might be questioning the usefulness of their equivalent privileges. Should the spousal confidential communications privilege be retained? This Note argues that the answer is yes. But as expressed by the New Mexico Supreme Court in its initial *Gutierrez* decision, the spousal

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7. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5422 (1st ed. 1980).

8. The spousal confidential communication privilege is one of two recognized marital privileges in American evidentiary practices. See *United States v. Lustig*, 555 F.2d 737, 747 (9th Cir. 1977) (“Federal courts recognize two distinct privileges arising out of the marital relationship. The first bars one spouse from testifying against the other . . . . The other privilege protects confidential marital communications. It bars testimony concerning intra-spousal, confidential expressions arising from the marital relationship.”). The adverse testimonial privilege, the second of the spousal privileges is discussed in further detail in Section I.A.1 of this Note.

9. See generally CHRISTOPHER F. KARPOWITZ & JEREMY C. POPE, THE AMERICAN FAMILY SURVEY, 2018 SUMMARY REPORT: IDENTITIES, OPPORTUNITIES AND CHALLENGES 8–13 (2018) (detailing the state of marriage and family in America according to survey results of the American public).

10. *Gutierrez*, 482 P.3d at 711 (abolishing the spousal confidential communications privilege in New Mexico).

11. *Rehearing*, 2020-NMCA-045, ¶ 109.

confidential communications privilege does face legitimate criticisms.<sup>12</sup> If the privilege is to survive in the modern era, it must be shown to serve a purpose that aligns the modern views of marriage with our modern legal system. In hopes of aiding the Rules Committee and any future bodies considering the privilege, this Note attempts to rationalize a modernized spousal confidential communications privilege worthy of retention considering current societal views of marriage.

For the spousal confidential communications privilege to be rationalized in the twenty-first century, the privilege must first be limited to apply only to the witness-spouse's election of invocation. By refocusing the privilege's protections onto only the witness-spouse, the modern societal values of individualism, personal autonomy, and intimacy are reflected. Then, by rationalizing this modernized spousal confidential communications privilege under a doctrine of excuse rather than attempting to fit the privilege into any traditional theory of justification, the spousal confidential communications privilege will serve a useful purpose in the modern legal system.

This Note is divided into three Parts. Part I of this Note discusses the history of the spousal privileges and details the two types of spousal privilege. Part II of this Note takes a closer look at the traditional justifications for the spousal confidential communications privilege and the criticisms surrounding these justifications, analyzing them through a twenty-first century lens. Finally, Part III argues that, in light of current views of marriage, the spousal confidential communications privilege can be retained. Using a witness-centered approach to rationalize its survival, the privilege can continue its existence into the twenty-first century. And by altering the privilege to focus solely on the witness-spouse, the privilege can reflect the values of modern society.

## I. BACKGROUND

Some formulation of the spousal confidential communications privilege has been recognized by U.S. courts since 1850<sup>13</sup> and has existed in both federal law and in all fifty states, either statutorily or

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12. *Gutierrez*, 482 P.3d at 708–11 (discussing the criticisms of the spousal confidential communications privilege).

13. *Developments in the Law—Privileged Communications: Familial Privileges*, 98 HARV. L. REV. 1563, 1563–65 (1985) [hereinafter *Familial Privileges*].

under common law.<sup>14</sup> But as the *Gutierrez* decision highlighted, perhaps it is time to revisit the spousal confidential communication's usefulness.

### A. Testimonial Privileges and the Marital Privileges

The ability for spouses to refuse to testify against each other under special circumstances is currently covered by the idea of testimonial privilege. There are two marital testimonial privileges: the spousal confidential communications privilege and the adverse testimonial privilege.<sup>15</sup> Both spousal privileges are among the few testimonial privileges recognized by the American legal system.<sup>16</sup>

The concept of evidentiary testimonial privilege has been around nearly as long as the existence of our legal system.<sup>17</sup> Throughout history, testimonial privileges have worked to signify the weight society imputes upon certain relationships by insulating these special relationships from being compelled to testify in court.<sup>18</sup> Examples of these relationships include attorney-client, clergy-penitent, psychotherapist-patient, and, as discussed in this Note, spouse-spouse.<sup>19</sup>

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14. See Ala. R. Evid. 504(b); Alaska R. Evid. 505(b); Ariz. Rev. Stat. Ann. § 12-2232 (2019); Ark. R. Evid. 504(b); Cal. Evid. Code § 980 (West 2019); Colo. Rev. Stat. § 13-90-107(1)(a)(I) (2019); Conn. Gen. Stat. Ann. § 54-84(b) (West 2019); Del. Unif. R. Evid. 504(b); D.C. Code § 14-306 (2019); Fla. Stat. Ann. § 90.504 (West 2019); Ga. Code Ann. § 24-5-503 (2019); Haw. R. Evid. 505(b); Idaho Code Ann. § 9-203(1) (2019); 735 Ill. Comp. Stat. Ann. 5/8-801 (West 2019); Ind. Code Ann. § 34-46-3-1(4) (West 2019); Iowa Code Ann. § 622.9 (West 2019); Kan. Stat. Ann. § 60-428 (2019); Ky. R. Evid. 504(b); La. Code Evid. Ann. art. 504 (2019); Me. Rev. Stat. Ann. tit. 15 § 1315 (2019); Md. Code Ann. Cts. & Jud. Proc. § 9-106 (West 2019); Mass. Gen. Laws Ann. 233 § 20 (2019); Mich. Comp. Laws Ann. § 600.2162(7) (West 2019); Minn. Stat. Ann. § 595.02(a) (West 2019); Miss. R. Evid. 504(b); Mo. Ann. Stat. § 546.260 (West 2019); Mont. Code Ann. § 26-1-802 (2019); Neb. Rev. Stat. § 27-505 (2019); Nev. Rev. Stat. Ann. § 49.295(1)(b) (West 2019); N.H. R. Evid. 504; N.J. Stat. Ann. § 2A:84A-22 (West 2019); N.M. Stat. Ann. § 11-505 (West 2020); N.Y. C.P.L.R. 4502(b) (McKinney 2019); N.C. Gen. Stat. § 8-57(c) (2019); N.D. R. Evid. 504(b); Ohio Rev. Code Ann. § 2945.42 (West 2019); Okla. Stat. Ann. tit. 12, § 2504 (West Supp. 2019); Or. Rev. Stat. § 40.255 (2019); 42 Pa. Cons. Stat. Ann. § 5914 (West 2019); R.I. Gen. Laws § 9-17-13 (2019); S.C. Code Ann. § 19-11-30 (2019); S.D. Codified Laws § 19-19-504 (2021); Tenn. Code Ann. § 24-1-201 (2019); Tex. R. Evid. 504(a)(2); Utah Code Ann. § 78-24-8(1) (2019); Vt. R. Evid. 504(b); Va. Code Ann. § 8.01-398, §1 9.2-271.2 (2019); Wash. Rev. Code Ann. § 5.60.060(1) (West 2019); W. Va. Code Ann. § 57-3-4 (West 2019); Wis. Stat. Ann. § 905.05 (West 2019); Wyo. Stat. Ann. § 1-12-104 (2019).

15. United States v. Lustig, 555 F.2d 737, 747 (9th Cir. 1977).

16. Amanda H. Frost, *Updating the Marital Privileges: A Witness-Centered Rationale*, 14 WIS. WOMEN'S L. J. 1, 6-7 (1999).

17. *Id.* at 6.

18. Jennifer Kelly, *He Said, She Said: Sex Crime Prosecutions and Spousal Privileges Under the Federal Rules of Evidence*, 86 ST. JOHN'S L. REV. 637, 642 (2012).

19. See generally PAUL F. ROTHSTEIN & SYDNEY A. BECKMAN, FEDERAL TESTIMONIAL PRIVILEGES § 1:2 (2d. ed. 2020) (providing an in-depth look at the most commonly recognized common law privileges).

In the American legal system, evidentiary rules are enumerated in the Federal Rules of Evidence.<sup>20</sup> Rule 501 discusses the evidentiary privileges:

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.<sup>21</sup>

Thus, the Federal Rules of Evidence acknowledge any existing or future privileges that are recognized under common law.<sup>22</sup> Because marital privileges are currently recognized at common law, according to Rule 501 they are governed by federal common law in criminal cases and state law in civil cases in which state law applies.<sup>23</sup> This Note focuses on the spousal confidential communications privilege, but because the two marital privileges often overlap in practice, it is important to provide a brief overview of each to help distinguish the two.

### 1. Adverse Testimonial Privilege<sup>24</sup>

The adverse testimonial privilege prevents a witness from being compelled to testify against his or her spouse.<sup>25</sup> This privilege is a remnant of two now-abandoned seventeenth-century canons.<sup>26</sup> The first is the rule preventing a party from testifying on his own behalf given his interest in the case's outcome.<sup>27</sup> The second is the doctrine of spousal incompetency.<sup>28</sup> This doctrine states that a woman is the property of her husband, and because she belongs to her husband, her testimony against her spouse would equate to forced self-incrimination.<sup>29</sup> In 1933,

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20. FED. R. EVID.

21. FED. R. EVID. 501.

22. *Id.*

23. *Id.*

24. Other names for the adverse testimonial privilege include the “testimonial privilege,” the “marital testimonial privilege,” the “spousal testimonial privilege,” the “marital or spousal ‘disqualification’ privilege,” and the “anti-marital facts’ privilege.” Kelly, *supra* note 18, at 643 n.37.

25. *Id.* at 643.

26. *Id.* at 643–44.

27. See *Trammel v. United States*, 445 U.S. 40, 44 (1980) (laying out the historical foundation of the adverse testimonial privilege); see also Frost, *supra* note 16, at 15–26 (providing more details on the origin of the marital privileges). The controversial historical background of the marital privilege has spurred feminist criticisms. These criticisms will be discussed in detail in Section III of this note.

28. Kelly, *supra* note 18, at 643–44.

29. See *Trammel*, 445 U.S. at 44; see also Frost, *supra* note 16, at 15–26 (providing more details on the origin of the marital privileges).

the United States Supreme Court formally abrogated the doctrine of spousal incompetency yet retained the adverse testimonial privilege through its holding in *Funk v. United States*.<sup>30</sup>

In a later Supreme Court decision, *Hawkins v. United States*, the Court specified the purpose for the adverse testimonial privilege: it is “necessary to foster family peace.”<sup>31</sup> In other words, the privilege helps maintain the marriage. However, twenty years later in *Trammel v. United States*, the Court recognized that the adverse testimony privilege’s stated purpose was no longer effectively served.<sup>32</sup> The Court reasoned that the marital harmony justifications articulated in *Hawkins* were unpersuasive because “[w]hen one spouse is willing to testify against the other in a criminal proceeding . . . their relationship is almost certainly in disrepair.”<sup>33</sup> Following this logic, the Court decided to limit the adverse testimonial privilege by eliminating a defendant-spouse’s right to invoke the privilege and bar his or her spouse from testifying.<sup>34</sup> Thus, as it currently stands, the adverse testimonial privilege may be invoked only by the witness-spouse who makes the choice to refrain from testifying.<sup>35</sup>

Today, the adverse testimonial privilege applies only in criminal proceedings and is limited solely to testimony that is incriminating in nature.<sup>36</sup> Further, the privilege may be asserted only during the defendant and witness-spouse’s marriage,<sup>37</sup> though it may be extended backward in time to cover testimony concerning events that happened before marriage.<sup>38</sup>

## 2. Spousal Confidential Communications Privilege

Similar to, but distinct from, the adverse testimonial privilege is the spousal confidential communications privilege. The spousal confidential communications privilege protects communications

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30. 290 U.S. 371, 381 (1933).

31. 358 U.S. 74, 77–78 (1958) (stating the privilege is “necessary to foster family peace” because adverse testimony would “be likely to destroy almost any marriage”).

32. 445 U.S. at 53.

33. *Id.* at 52.

34. *Id.* at 52–53.

35. *Id.*

36. Frost, *supra* note 16, at 12.

37. *United States v. Smith*, 533 F.2d 1077, 1079 (8th Cir. 1976) (the adverse testimonial privilege “does not survive a dissolution of the marriage by divorce prior to trial”).

38. *See United States v. Owens*, 424 F. Supp. 421, 423–425 (E.D. Tenn. 1976) (allowing the privilege to cover incriminating testimony related to events that occurred before the defendant and witness were married).

between spouses made during marriage that were intended to be confidentially kept within the confines of the marriage relationship.<sup>39</sup>

The spousal confidential communications privilege is one of the oldest recognized privileges in English common law.<sup>40</sup> In 1839, the Supreme Court in *Stein v. Bowman* stated that the spousal confidential communications privilege is founded upon principles “which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life.”<sup>41</sup> The purpose of the spousal confidential communications privilege is similar to that of other recognized communications privileges (e.g., attorney-client, doctor-patient, and clergy-communicant):<sup>42</sup> each is “rooted in the imperative need for confidence and trust.”<sup>43</sup> The spousal confidential communications privilege works to promote trust and communication within the institution of marriage.

Unlike the adverse testimonial privilege, the spousal confidential communications privilege is available in both civil and criminal actions.<sup>44</sup> And the relationship requirements for the spousal confidential communications privilege are different from those of the adverse testimonial privilege. The spousal confidential communications privilege simply requires a valid marriage to have existed at some point.<sup>45</sup> The marriage does not have to be ongoing at the time of a legal proceeding for it to be invoked, and the privilege can extend past dissolution of the marriage.<sup>46</sup> This is because, unlike the adverse testimonial privilege, the spousal confidential communications privilege is not concerned with protecting *this* marriage *now* but rather encouraging and protecting marital communication in general.<sup>47</sup> As long as the communication occurred during the marriage, the privilege may apply.<sup>48</sup> And any communications made before or after the existence of a marriage relationship, because they are not made in the furtherance of the marriage relationship, are not covered by the

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39. ROTHSTEIN, *supra* note 19, § 4:10.

40. Kelly, *supra* note 18, at 645

41. 38 U.S. 209, 223 (1839); *see also* Wolfe v. United States, 291 U.S. 7, 14 (1934) (“The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails.”).

42. Mikah K. Story, *Twenty-First Century Pillow-Talk: Applicability of the Marital Communications Privilege to Electronic Mail*, 58 S.C. L. REV. 275, 278–79 (2006).

43. Trammel v. United States, 445 U.S. 40, 51 (1980).

44. ROTHSTEIN, *supra* note 19, § 4:12.

45. The marriage must be legally recognized for the privilege to apply, so most common law marriages or bigamous relationships are not recognized. *Id.* § 4:11.

46. *Id.* § 4:11.

47. *Id.*

48. *Id.*

privilege.<sup>49</sup> Finally, unlike the adverse testimonial privilege, most courts allow either the communicator- or the communicatee-spouse to invoke the privilege, preventing either spouse from testifying.<sup>50</sup>

The spousal confidential communications privilege, however, is also narrower than the adverse testimonial privilege because it applies only to confidential communications. Confidential communications include both oral and written communications and intentional gestures.<sup>51</sup> However, privacy between the spouses alone is not sufficient to constitute a confidential communication.<sup>52</sup> There must be an intent to convey a message from one spouse to another.<sup>53</sup>

Additionally, the confidential communications must be made in furtherance of and in reliance on the marital relationship.<sup>54</sup> Because the spousal confidential communications privilege was traditionally justified based upon the idea that it promotes marital intimacy and privacy, communications unrelated to these goals are not considered protected by the privilege.<sup>55</sup> Examples of communication clearly not made in furtherance of the marriage relationship and held to fall outside of the privilege's purview include conversations relating solely to property, to business transactions,<sup>56</sup> or most notably, threats of violence.<sup>57</sup>

When it comes to confidentiality, communications between spouses are presumed confidential,<sup>58</sup> but this presumption is rebuttable

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49. *Id.* Thus, the spousal confidential communication privilege is different from the adverse testimonial privilege which can be extended to cover events that occurred prior to a marriage.

50. *Id.* § 4:13. However, it should be noted that some jurisdictions have found that it is only the communicator spouse who may invoke the privilege. *Id.*

51. *Id.* § 4:12.

52. *See* *United States v. Smith*, 533 F.2d 1077, 1079 (8th Cir. 1976) (dismissing the defense's argument that the privilege should apply to any acts done privately in the presence of the spouse).

53. *United States v. Espino*, 317 F.3d 788, 795 (8th Cir. 2003) (“[I]nvocation of the privilege requires the presence of at least a gesture that is communicative or intended by one spouse to convey a message to the other.”). Thus, mere observations of a spouse's actions without any intent to communicate anything have been held to not be covered by the privilege. ROTHSTEIN, *supra* note 19, § 4:12.

54. ROTHSTEIN, *supra* note 19, § 4:11.

55. *Id.*; Frost, *supra* note 16, at 2.

56. *See* *Fowler v. United States*, 352 F.2d 100, 113 (8th Cir. 1965) (“The fact that the communication relates to business transactions tends to show that it was not intended as confidential. . . . Usually such statements relate to facts which are intended later to become publicly known.”). However, it should be noted that spousal communications are not deprived of the privilege just because they relate to financial matters. *United States v. Rakes*, 136 F.3d 1, 3 (1st Cir. 1998) (finding that financial conversations that are “manifestly sensitive” may show an intent of confidentiality).

57. *United States v. White*, 974 F.2d 1135, 1138 (9th Cir. 1992) (“[T]hreats against spouses and a spouse's children do not further the purposes of the privilege and that the public interest in the administration of justice outweighs any possible purpose the privilege serve in such a case.”).

58. *Blau v. U.S.*, 340 U.S. 332, 333 (1951).

by showing a lack of confidentiality.<sup>59</sup> The burden to rebut the presumption is on the party against whom the privilege is invoked.<sup>60</sup> Further, the confidentiality of a communication is highly contextual and depends on the circumstances and nature of the communication.<sup>61</sup> For example, communication made in the presence of third parties, even if intended to be confidential, rebuts the presumption of confidentiality.<sup>62</sup> This includes children old enough to comprehend the communications and family members even in the intimacy of the family circle.<sup>63</sup> Any communication intended to eventually be revealed to a third party or actually revealed to a third party at a later time is not considered confidential.<sup>64</sup> Finally, private eavesdroppers may destroy the privilege,<sup>65</sup> though state-authorized eavesdropping, like wiretapping, does not destroy the privilege.<sup>66</sup> Thus, because of the strict confidentiality requirements, the privilege is very limited in its application.

Finally, there are a variety of policy-based exceptions to the spousal confidential communications privilege that keep the privilege more in line with what the public considers morally acceptable. In a majority of jurisdictions, the spousal confidential communications privilege does not apply when the defendant is accused of crimes against children of either spouse.<sup>67</sup> The privilege also does not apply in

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59. *Pereira v. United States*, 347 U.S. 1, 6 (1954) (“Although marital communications are presumed to be confidential, that presumption may be overcome by proof of facts showing that they were not intended to be private.”)

60. *U.S. v. Lea*, 249 F.3d 632, 641–42 (7th Cir. 2001).

61. For example, a note left for a spouse on a large cardboard sign was held not to be confidential because it could be seen by anyone. *Yoder v. U.S.*, 80 F.2d 665, 668 (10th Cir. 1935) (“[T]he method and the nature of this communication demonstrate that there was nothing confidential about it.”); *see also Lynch v. Sec’y, Dep’t of Corrs.*, 897 F. Supp. 2d 1277, 1311 (M.D. Fla. 2012) (finding a murder-suicide letter not covered by the privilege because the letter was intended to be seen by others).

62. ROTHSTEIN, *supra* note 19, § 4:12.

63. *Id.*

64. *Id.*

65. *Id.* When the communication is overheard by an eavesdropper, “the privilege is unnecessary because neither spouse can blame the other for the breach of confidence and thus will continue to confide in one another.” *Id.*

66. *See State v. Terry*, 94 A.3d 882, 889 (N.J. 2014) (discussing why wiretapping by the State is not considered to destroy the spousal confidential communication privilege).

67. Ala. R. Evid. 504(d); Alaska R. Evid. 505(b)(2); Ark. R. Evid. 504(d); Del. R. Evid. 504(d); D.C. Code Ann. § 14-306; Fla. Stat. Ann. § 90.504 (3) (West 2014); Haw. Rev. Stat. § 626-1(c) (West); Idaho Code Ann. § 9-203(1) (West); 735 ILCS 5/8-801 (West 2014); Kan. Stat. Ann. § 60-428 (b) (West 2014); Ky. R. Evid. 504(c)-(d); La. Code Evid. Ann. art. 504(c); Me. R. Evid. 504(d); Mass. Gen. Laws Ann. Ch. 233, § 20 (West); MCLS § 600.2162; Minn. Stat. Ann. § 595.02 (West); Miss. R. Evid. 504(d); Mo. Ann. Stat. § 546.260 (West); Mont. Code Ann. § 26-1-802; Neb. Rev. Stat. § 27-505; Nev. Rev. Stat. Ann. § 49.295 (West); N.H. R. Evid. 504; N.D. R. Evid. 504(d); Ohio Rev. Code Ann. § 2945.42 (West); Okla. Stat. Ann. tit. 12, § 2504 (d) (West); Or. Rev. Stat. Ann. § 40.255(a) (West); S.C. Code Ann. § 19-11-30; Tenn. Code Ann. § 24-1-201; Tex. Evid. R. 504(a)(4); Utah R.

cases of crimes committed by one spouse against the other,<sup>68</sup> nor does it apply to communications concerning joint criminal activity, including the crime-fraud exception<sup>69</sup> and the furtherance-of-crime exception.<sup>70</sup>

As this discussion of the spousal privileges demonstrates, the spousal confidential communications privilege has historically been widely accepted but diversely applied. Jurisdictions differ in how the privilege can be exercised, against which spouses the privilege can be invoked, and in which contexts the privilege applies. The variation in which the spousal confidential communications privilege is applied has left the privilege vulnerable to reconsideration, and with New Mexico's *Gutierrez* decision, it is time to examine the privilege more closely.

### B. *State v. Gutierrez*

In August 2019, the New Mexico Supreme Court announced that it would become the first and only state to abolish the spousal confidential communications privilege<sup>71</sup> in *State v. Gutierrez*.<sup>72</sup>

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Evid. Rule 502(e); Vt. R. Evid. 504(d); Wash. Rev. Code Ann. § 5.60.060 (West); Wis. Stat. § 905.05(3).

68. Ala. R. Evid. 504(d); Alaska R. Evid. 505(b)(2); Ark. R. Evid. 504(d); Del. R. Evid. 504(d); D.C. Code Ann. § 14-306; Fla. Stat. Ann. § 90.504 (3) (West 2014); Haw. Rev. Stat. § 626-1(c)(West); Idaho Code Ann. § 9-203(1) (West); 735 ILCS 5/8-801(West 2014); Kan. Stat. Ann. § 60-428 (b) (West 2014); Ky. R. Evid. 504(c)-(d); La. Code Evid. Ann. art. 504(c); Me. R. Evid. 504(d); Mass. Gen. Laws Ann. Ch. 233, § 20 (West); MCLS § 600.2162; Minn. Stat. Ann. § 595.02 (West); Miss. R. Evid. 504(d); Mo. Ann. Stat. § 546.260 (West); Mont. Code Ann. § 26-1-802; Neb. Rev. Stat. § 27-505; Nev. Rev. Stat. Ann. § 49.295 (West); N.H. R. Evid. 504; N.D. R. Evid. 504(d); Ohio Rev. Code Ann. § 2945.42 (West); Okla. Stat. Ann. tit. 12, § 2504(d) (West); Or. Rev. Stat. Ann. § 40.255(a) (West); S.C. Code Ann. § 19-11-30; Tenn. Code Ann. § 24-1-201; Tex. Evid. R. 504(a)(4); Utah R. Evid. Rule 502(e); Vt. R. Evid. 504(d); Wash. Rev. Code Ann. § 5.60.060 (West); Wis. Stat. § 905.05(3).

69. All eleven of the federal circuits to consider whether to adopt the crime-fraud exception have done so. *See, e.g.*, *United States v. Evans*, 966 F.2d 398, 401 (8th Cir. 1992), *cert. denied*, 506 U.S. 988, 113 S. Ct. 502, 121 L.Ed.2d 438 (1992); *United States v. Marashi*, 913 F.2d 724, 731 (9th Cir. 1990); *United States v. Malekzadeh*, 855 F.2d 1492, 1496 (11th Cir. 1988), *cert. denied*, 489 U.S. 1029 (1989); *United States v. Estes*, 793 F.2d 465, 466–68 (2d Cir. 1986); *United States v. Picciandra*, 788 F.2d 39, 43 (1st Cir. 1986), *cert. denied*, 479 U.S. 847 (1986); *United States v. Sims*, 755 F.2d 1239, 1243 (6th Cir. 1985), *cert. denied*, 473 U.S. 907 (1985); *United States v. Neal*, 743 F.2d 1441, 1446–47 (10th Cir. 1984), *cert. denied*, 470 U.S. 1086 (1985); *United States v. Broome*, 732 F.2d 363, 365 (4th Cir.), *cert. denied*, 469 U.S. 855 (1984); *United States v. Ammar*, 714 F.2d 238, 258 (3d Cir. 1983), *cert. denied*, 464 U.S. 936 (1983); *United States v. Mendoza*, 574 F.2d 1373, 1381 (5th Cir. 1978), *cert. denied*, 439 U.S. 988 (1978); *United States v. Kahn*, 471 F.2d 191, 194 (7th Cir. 1972), *rev'd on other grounds*, 415 U.S. 143 (1974).

70. *Craft v. State*, 90 So. 3d 197, 210–11 (Ala. Crim. App. 2011) (“Those marital communications had to do with the commission of the crime and not with the privacy of the marriage itself . . . [t]he information sought had nothing to do with intimate marital relations, and the privacy interests of the husband and wife were not at stake.”).

71. *State v. Gutierrez*, 482 P.3d 710, 711 (N.M. 2019).

72. *Id.*

*Gutierrez* concerned an appeal of a murder conviction.<sup>73</sup> The defendant, David Gutierrez, was found guilty of shooting and killing a man in 2002.<sup>74</sup> At his trial, both of Gutierrez's ex-wives were allowed to testify that during their respective relationships with Gutierrez, he had revealed to them that he had committed the murder.<sup>75</sup> These incriminating testimonies led to Gutierrez's conviction.<sup>76</sup> At his appeal to the New Mexico Supreme Court, Gutierrez argued that under New Mexico's spousal confidential communications privilege,<sup>77</sup> which allows a defendant to prevent his spouse from testifying about confidential communications held between the defendant and the witness-spouse during marriage,<sup>78</sup> the district court erred by preventing him from invoking the privilege in order to exclude his ex-wives' testimonies.<sup>79</sup> The court disagreed for multiple reasons.<sup>80</sup> But the court then went beyond Gutierrez's specific circumstances and used the opportunity as a way to more closely examine New Mexico's spousal confidential communications privilege.<sup>81</sup> In doing so, the court ultimately decided to abrogate the privilege in its entirety.<sup>82</sup> In a detailed discussion weighing the justifications for the spousal confidential communications privilege against the privilege's criticisms, the New Mexico Supreme Court came to the conclusion that the privilege's traditional justifications of promoting marital intimacy and privacy no longer "withstand scrutiny" and found that the "decision to abandon the privilege was correct."<sup>83</sup>

The New Mexico Supreme Court began its discussion by considering traditional justifications for the spousal confidential communications privilege, including those founded in the utilitarian approach, the humanistic approach, the privacy theory, and the image

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73. *Id.* at \*1.

74. *Id.*

75. *Id.*

76. *Id.* at \*2.

77. Rule 11-505(B) NMRA (held invalid by *Gutierrez*, 482 P.3d at 711).

78. ROTHSTEIN, *supra* note 19, § 4:10.

79. *Id.*

80. *Gutierrez*, 482 P.3d at 710. The court stated that the testimony of the first wife was harmless error because she was allowed to testify what she observed and experienced when visiting the crime scene; the privilege does not protect against observations. *Id.* at 711. The second wife's testimony was likewise admissible because Gutierrez could not prove by a preponderance of evidence that they were married at the time of communication; the privilege only attaches to communications made during marriage. *Id.*

81. *Id.* at 704–10.

82. *Id.* at 711.

83. *Id.* at 710

theory.<sup>84</sup> The court then compared those justifications with the academic criticisms concerning them. These include the fact that the privilege does little in the way of promoting communication in a marriage because it is unusual that the privilege's existence is the driving force behind marriage communication.<sup>85</sup> Additionally, the court looked at the gender-disparate impact caused by the privilege's perpetuation of the role of male domination.<sup>86</sup> Because the spousal confidential communications privilege is normally invoked by the male figure in the relationship, it tends to perpetuate the notion of male domination by benefitting men more often than women.<sup>87</sup> After considering these criticisms, the court determined the "privilege has outlived its purpose."<sup>88</sup>

The *Gutierrez* decision is not the first time the spousal confidential communications privilege, or its counterpart, the adverse testimonial privilege,<sup>89</sup> has been criticized; the privilege has long suffered under the criticism that the traditional justifications backing the privilege ring hollow in modern society.<sup>90</sup> Now that the New Mexico Supreme Court has sent the privilege to the Rules Committee, it is time to reconsider the privilege's usefulness for the twenty-first century.

## II. ANALYSIS

Modern views of marriage have forced us to alter the way we attempt to rationalize the continued existence of the spousal confidential communications privilege. Traditional theories that have historically been used to attempt to justify the privilege inadequately defend the privilege's continued existence. Critics of the spousal confidential communications privilege argue that without justification, the privilege should cease to exist; this line of reasoning resulted in the

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84. *Id.* at 706–08. *See also* Frost, *supra* note 16, at 15–26 (providing a deeper look into the various rationales and theories backing the spousal confidential communication privilege). These theories are discussed in detail in this Note in Part III.

85. *Gutierrez*, 482 P.3d at 708. *See also infra* Section III.A.1.

86. *Gutierrez*, 482 P.3d at 709.

87. *Id.*

88. *Id.*

89. The spousal confidential communication privilege is one of two recognized marital privileges in American evidentiary practices. *See* U.S. v. Lustig, 555 F.2d 737, 747 (9th Cir. 1977) ("Federal courts recognize two distinct privileges arising out of the marital relationship. The first bars one spouse from testifying against the other. . . . The other privilege protects confidential marital communications. It bars testimony concerning intra-spousal, confidential expressions arising from the marital relationship."). The adverse testimonial privilege, the second of the spousal privileges is discussed in further detail in Section II.A.1 of this Note.

90. *Infra* Part II.

*Gutierrez* decision.<sup>91</sup> But while justifications may continue to fail, the thriving modern institution of marriage suggests that complete abolition of the spousal confidential communications privilege may not be the best choice. Retaining the privilege must be backed by reasoning, but the spousal confidential communications privilege can no longer be defended under traditional theories of justification. Thus, in order to retain the privilege, we must change how we rationalize it. To do so, this Note calls for retaining the spousal confidential communications privilege under a witness-centered approach, which rationalizes the privilege under a doctrine of excuse rather than a theory of justification.

### A. *The Failure of Traditional Justifications for the Spousal Communications Privilege*

As the majority in *Gutierrez* mentioned,<sup>92</sup> scholars have attempted to justify the spousal confidential communications privilege through the use of many theories over the years.

While many of these theories come close to providing a satisfying justification of the privilege, none fully demonstrate why the privilege should remain a part of our legal system. Because the privilege must be rationalized to be retained, it is important to understand why the traditional theories fail in justifying the privilege so that more appropriate rationalizations can be considered.

#### 1. Wigmore's Utilitarian Approach

The utilitarian approach, first posited by Wigmore, is the most common justification for the testimonial privileges.<sup>93</sup> The utilitarian approach's strength lies in its argument that privileges are justified when they serve to encourage the communication necessary for the proper functioning of socially beneficial relationships.<sup>94</sup> Under this approach, privileges are justified only if the social benefits that come from recognizing a privilege outweigh the costs of the potential loss of information in a legal proceeding.<sup>95</sup> The utilitarian theory claims to justify the spousal communications privilege by asserting the privilege encourages marital communications and produces marital harmony which, in turn, adequately benefits society.<sup>96</sup>

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91. *Id.* at 6–8.

92. *Id.*

93. Frost, *supra* note 16, at 15.

94. *Id.* at 15–16.

95. *Id.*

96. *Gutierrez*, 482 P.3d at 706.

However, under the utilitarian approach, a testimonial privilege is not recognized as socially beneficial until four conditions are met:

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.<sup>97</sup>

Unless each of the four criteria is met, no privilege can or should exist.<sup>98</sup>

When considering the spousal confidential communications privilege, the first of these factors—confidence of nondisclosure—is met by establishing that a communication between spouses was intended to be confidential. This factor can be satisfied easily because it is a subjective determination.<sup>99</sup> Similarly, the third element is met by the spousal confidential communications privilege. The third factor requires the privilege to attach to a relationship that society seeks to protect.<sup>100</sup> History demonstrates that the marital relationship is one that society has continually valued and “sedulously fostered.”<sup>101</sup> For example, in *Maynard v. Hill*, the Supreme Court recognized that the marital relationship is the most important relationship in life, stating that marriage is “the foundation of the family and of society, without which there would be neither civilization nor progress.”<sup>102</sup> And while society has changed significantly since this statement was made, the sentiment remains. As demonstrated by the 2015 decision in *Obergefell v. Hodges*, which declared the right to marry a fundamental right inherent in the liberty of a person, marriage is still a valued institution by the American public.<sup>103</sup> Thus, the marital relationship is likely one society will continue to elevate to the status required by the third factor.

However, when considering the second condition required for the recognition of a privilege under the utilitarian approach, the spousal confidential communications privilege begins to fall apart. The second factor of the utilitarian approach requires confidentiality, and thus the

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97. Story, *supra* note 42, at 305.

98. *Id.*

99. *Id.*

100. *Id.* at 307.

101. *Id.*

102. 125 U.S. 190, 205, 211 (1888).

103. 135 S. Ct. 2584, 2604 (2015) (legalizing same-sex marriage nationwide).

privilege's existence, to be the glue holding a relationship together.<sup>104</sup> The spousal confidential communications privilege fails under the utilitarian approach because the privilege is not the basis for most spouses confiding in each other.<sup>105</sup> Rather, the foundation for most marital communication is the trust and affection imbued in a marriage.<sup>106</sup> In fact, it is unlikely that married couples even know the spousal confidential communications privilege exists until they need it.<sup>107</sup> Thus, the privilege is acting to protect only the minority of marital relationships in which at least one spouse has knowledge of it.<sup>108</sup>

Further, the fourth factor—the injury to the relationship is greater than the litigation benefit—likewise presents issues with the recognition of the spousal confidential communications privilege. Marriages are not built on the dependence on and knowledge of guaranteed confidentiality.<sup>109</sup> It is unlikely that the lack of the spousal confidential communications privilege would harm or effect the institution of marriage in any remarkable way.<sup>110</sup> Many of the other privileged relationships, such as attorney-client or psychotherapist-patient, rely on the existence of guaranteed confidentiality for the relationships to function properly.<sup>111</sup> For example, many privileged relationships carry legal consequences, and it is understandable to think that individuals might entirely avoid medical treatment, religious guidance, or legal advice if there was no guaranteed confidentiality to protect them.<sup>112</sup> Unlike those relationships, marriages are built on a multitude of factors, and it is unlikely that the spousal confidential communications privilege plays any significant part.<sup>113</sup>

Thus, because the spousal confidential communications privilege does not meet all four of the utilitarian theory conditions for recognizing a testimonial privilege, the utilitarian theory fails to fully justify the privilege's existence.

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104. Story, *supra* note 42, at 305.

105. *Id.* at 306.

106. *Id.*

107. *Id.* at 306–07; *Gutierrez*, 482 P.3d at 708 (“One of [the privilege’s] principal weaknesses is that it rests on two untested assumptions: that (1) married people know the privilege exists, and (2) they rely on it when deciding how much information to share.”).

108. *Id.*

109. Frost, *supra* note 16, at 17–18.

110. Story, *supra* note 42, at 308.

111. Frost, *supra* note **Error! Bookmark not defined.**, at 18.

112. *Id.*

113. *Id.*

## 2. The Humanitarian Approach

Unlike the utilitarian approach, which focuses on the *social* benefit of a testimonial privilege, the humanistic approach focuses on protecting *individual* rights.<sup>114</sup> The utilitarian approach is founded upon moral principles, arguing that certain concepts such as privacy and autonomy should be prioritized despite any effects the exercising of these rights may have on the admissibility of evidence.<sup>115</sup>

The spousal confidential communications privilege affects very little in the marriage relationship, but under the humanitarian approach, the privilege claims to be justified for its work in protecting personal privacy.<sup>116</sup> The humanitarian approach suggests that the testimonial privileges exist to protect an individual's right to confide in certain relationships without fear of compelled disclosure of the information or interference by the government.<sup>117</sup> In the context of the marital relationship, the privilege is suggested to exist to protect the privacy to confide in one's spouse.<sup>118</sup>

Differing definitions of privacy also lead to further justifications for the spousal confidential communications privilege under the humanitarian approach.<sup>119</sup> In one sense, privacy is defined in terms of the autonomy one has over the information about himself or herself; thus, the privilege is justified through its protection against the dissemination of an individual's personal information.<sup>120</sup> In another sense, privacy is defined through the protection of familial relationships.<sup>121</sup> Protecting marital privacy has long been valued by the American public. For example, the Supreme Court in *Griswold v. Connecticut* stated that the thought of allowing the government to "search the sacred precincts of marital bedrooms" is "repulsive."<sup>122</sup> Through the privacy rationale, the spousal confidential communications privilege is justified by allowing free communication within a marriage without fear of government interference.

However, in attempting to fully justify the spousal confidential communications privilege, the humanistic approach also falls flat. Most notably, the privilege is rather inadequate and underinclusive in

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114. *Gutierrez*, 482 P.3d at 706.

115. *Story*, *supra* note 42, at 308–09.

116. *Frost*, *supra* note 16, at 24.

117. *Story*, *supra* note 42, at 309.

118. *Id.*

119. *Familial Privileges*, *supra* note 13, at 1583.

120. *Id.*

121. *Id.*

122. 381 U.S. 479, 485–486 (1965).

working to protect individual privacy.<sup>123</sup> Because the privilege protects only oral communication, written communication, and intentional gestures meant to be kept confidential, many of the most personal and intimate interactions between spouses do not benefit from the privilege's protection.<sup>124</sup> For example, an individual would not be protected against testifying about what his spouse muttered in her sleep, or whether his wife looked nervous, or tired, or sick.<sup>125</sup> This lack of protection is significant because "some of the most personal and intimate interactions between spouses" are those moments when no specific communication is intended and those moments that are merely observed in the private confines of a marriage.<sup>126</sup> Under the humanistic approach, these moments still deserve full protection, yet the privilege does not cover them.<sup>127</sup> The limitations imposed on the spousal confidential communications privilege make its protections too narrow for the broad umbrella of privacy to justify it under the humanistic approach.

Further, as discussed above, it is evident that the majority of spouses communicate without regard to the legal protection provided by the spousal confidential communications privilege. What motivates communication between spouses is not guaranteed confidentiality but rather the "trust . . . place[d] in the loyalty and discretion of each other."<sup>128</sup> Thus, under the humanistic approach, the efficacy of the spousal confidential communications privilege to "protect and foster frank communication" is unconvincing.<sup>129</sup>

### 3. The Image Theory

Another proposed justification for the testimonial privileges, known as the image theory, is that the privileges enhance public acceptance of the legal system.<sup>130</sup> Although the image theory has never been invoked by courts, it argues that the spousal privileges are justified because they allow for the avoidance of negative situations that might undermine the public's perception of the system's legitimacy.<sup>131</sup> One of the largest arguments for maintaining the spousal privileges is that they help to prevent the moral repugnance of forcing an individual

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123. Frost, *supra* note 16, at 25.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *State v. Gutierrez*, 482 P.3d 700, 708 (N.M. 2019).

129. *Id.*

130. *Familial Privileges*, *supra* note 13, at 1585.

131. *Id.*

to have to choose between testifying against their spouse, perjuring themselves, or face being held in contempt of court for refusing to testify.<sup>132</sup>

However, the image theory also has its problems when it comes to justifying the spousal confidential communications privilege. First, it is a rare that the public becomes aware of those few repugnant instances in which an individual is forced to testify against his or her spouse.<sup>133</sup> Because the image theory relies on public awareness for the privilege to be justified, the lack of such awareness suggests a weakness in the theory. Second, certain applications of the spousal confidential communications privilege may work to harm the public perception of the legal system instead of helping foster acceptance.<sup>134</sup> For example, the thought of a defendant-spouse preventing a willing witness-spouse from testifying creates an instinctual repulsive tinge to a society that values personal autonomy.<sup>135</sup> Thus, for the image theory to be a valid and full justification of the spousal confidential communications privilege, the privilege would be justified only if the privilege was granted solely to the witness-spouse.<sup>136</sup>

#### 4. The Power Theory

Finally, when justifications fail, the power theory at least attempts to explain the existence of testimonial privileges. This theory states that the emergence of the testimonial privileges is accounted for by the male-dominated structure of our society.<sup>137</sup>

The power theory explains that the ancient marriage traditions that denied legal identity to the wife and viewed the husband as dominant helped form the foundations of the spousal privileges,<sup>138</sup> and even though times have changed and the spousal privileges no longer directly promote male domination, the privileges continue to perpetuate the idea.<sup>139</sup> Particularly, feminist scholars have attacked the spousal privileges under the power theory by suggesting that the spousal confidential communications privilege was “created to protect men, who

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132. *Gutierrez*, 482 P.3d at 707; *Story*, *supra* note 42, at 315.

133. *Familial Privileges*, *supra* note 13, at 1586.

134. *Id.*

135. *Id.*

136. *Id.*; *see also infra* Section III.A, which argues that the spousal confidential communication privilege can be rationalized in the twenty-first century only if the privilege is offered to solely the witness-spouse.

137. *Familial Privileges*, *supra* note 13, at 1586.

138. *Id.*; *see also supra* Section II.A.1, which discusses the origins of the adverse testimonial privilege.

139. *Familial Privileges*, *supra* note 13, at 1586–87.

are often reluctant to share their personal thoughts and therefore 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.”<sup>140</sup> Further, feminist arguments suggest that privileges are often shrouded in the excuse of privacy, shielding the family from the government and “perpetuating traditional gender hierarchies and power imbalances.”<sup>141</sup>

In general, the spousal privileges do tend to benefit men more than women.<sup>142</sup> The witness-spouse prevented from testifying is usually a woman.<sup>143</sup> Thus, the privileges, particularly the spousal confidential communications privilege, work to protect the confidences of men more than of women.<sup>144</sup>

Assuming the power theory does provide some explanation for why the spousal privileges came into being, the theory only diminishes the argument for their continued existence.<sup>145</sup> But it should be noted that much of the research and discussion of the power theory was conducted in the late twentieth century. Views of marriage have since changed, and it is unclear whether the ideas behind the power theory continue to adequately explain the survival of the spousal privileges today.

### *B. The Modern Institution of Marriage*

American society has changed drastically since 1888 when the Supreme Court stated that marriage is “the foundation of the family and of society, without which there would be neither civilization nor progress.”<sup>146</sup> Yet today’s modern expectations of marriage still reflect a strong belief in the institution of marriage. In 2015, after years of fighting for equal marital rights, society’s view of what marriage is and should be was enshrined into federal law when same-sex marriage was legalized by the Supreme Court in *Obergefell v. Hodges*.<sup>147</sup> The decision in *Obergefell* reflects the importance culture places upon individual

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140. Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413, 440 (1991).

141. Frost, *supra* 16, at 24–25.

142. *Id.*

143. *Id.* One study by a professor in the 1980s estimated that over ninety percent of the times the spousal confidential communication privilege is invoked, it is invoked against a woman. *Id.* at 1587 n.170.

144. *Id.*

145. *Id.* at 20.

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

147. 135 S. Ct. 2584, 2591 (2015).

autonomy and the significant role that marriage plays in American society.<sup>148</sup>

Additionally, as of 2019, the divorce rates in the United States were at a forty-year low, and they continue to decline.<sup>149</sup> In 1963, women were married at the median age of twenty, but by 2017, the median age of marriage for women increased to twenty-seven.<sup>150</sup> These marriage trends are due partly to modern couples not feeling the need to get married right away.<sup>151</sup> In today's society, marriage is no longer a necessity for survival but rather an intimate choice that reflects a true commitment between individuals.<sup>152</sup>

Further, cultural movements, which help shape society's modern view of marriage, demonstrate how important individualism, autonomy, and representation are to American culture. Stances seen in the Me Too, pro-choice, gender equality, race relations, and diversity and inclusion movements show how strongly American society values inclusion, individuality, and choice. These values are reflected in society's choices about the institution of marriage.

Citizens are prioritizing individual autonomy and taking the institution of marriage seriously as a choice and reflection of intimacy. These concepts help define society's modern notion of the institution of marriage and demonstrate the room left for the spousal confidential communications privilege's continued existence in the American legal system.

### *C. Doctrine of Excuse*

Because traditional theories fail to justify the spousal confidential communications privilege, the retention of the privilege must be rationalized differently. Excuse offers one such rationalization. The difference between justification and excuse is best explained through their uses in criminal law. An actor is justified if she makes the morally right decision.<sup>153</sup> In contrast, an actor is excused if she acts in a way that is morally wrong, but not blameworthy, given ordinary

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148. *Id.* at 2589 (“[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy. . . . [T]he right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”)

149. Jo Craven McGinty, *The Divorce Rate Is at a 40-Year Low, Unless You're 55 or Older*, WALL ST. J. (June 21, 2019, 7:30 am), <https://www.wsj.com/articles/the-divorce-rate-is-at-a-40-year-low-unless-youre-55-or-older-11561116601> [<https://perma.cc/T4M9-3HMZ>].

150. *Id.*

151. *Id.*

152. *Id.*

153. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 798 (2000).

human reactions to extraordinary pressures.<sup>154</sup> The Model Penal Code establishes a threshold of when “a person of reasonable firm-ness” would be “unable to resist” as a way to determine if a morally wrong action should be excused.<sup>155</sup> This threshold is determined by a moral judgment about what we expect an average individual to be able to resist in difficult situations.<sup>156</sup>

While the Model Penal Code does not provide guidance for evidentiary privileges, the normative framework behind the concept of excuse can help rationalize the spousal communications privilege, particularly when viewed from the perspective of the witness-spouse. Without the spousal communications privilege, an unwilling witness-spouse would be forced to choose between betraying a spouse, committing perjury, or being held in contempt of court for refusing to testify.<sup>157</sup> Because testifying against a spouse and being jailed for contempt carry obvious negative consequences, the choice of perjury becomes a wrong, but not blameworthy, choice that the average citizen would likely resort to in similar cases.<sup>158</sup> But a law that would allow for excuse from perjury would not only reduce the public’s confidence in the justice system but would also subvert the testimony of any witness-spouse, including those choosing to tell the truth.<sup>159</sup> So to avoid these negative consequences, the spousal confidential communications privilege can work to remove the forced choice of perjury by protecting a witness-spouse’s choice to remain silent.<sup>160</sup> Thus, under the doctrine of excuse, the privilege may be rationalized by shifting the focus onto how the privilege can provide individual autonomy to the witness-spouse through accommodating their choice of whether to testify.<sup>161</sup>

### III. RETAINING THE SPOUSAL CONFIDENTIAL COMMUNICATIONS PRIVILEGE UNDER A WITNESS-CENTERED APPROACH

As discussed in Part III, the traditional justifications for the testimonial privileges no longer adequately rationalize the spousal confidential communications privilege. But modern views of the institution of marriage suggest that the privilege still serves a valuable legal purpose. So in order to retain the privilege, Part III of this Note

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154. *Id.*

155. *Id.* at 804.

156. *Id.*

157. *State v. Gutierrez*, 482 P.3d 710, 707 (N.M. 2019).

158. *Frost*, *supra* note 16, at 29.

159. *Id.*

160. *Id.*

161. *See infra* Part III.

proposes how American society's view of modern marriage can help formulate a way to rationalize the spousal confidential communications privilege under a doctrine of excuses and provide a new purpose for the privilege that better aligns with the values of our modern legal system.

### *A. The Witness-Centered Privilege*

Before we can begin to rationalize the privilege, it must be adjusted to fit the expectations of modern society. As it exists currently, the spousal confidential communications privilege cannot be rationalized considering the many changes in society. As the Supreme Court stated in *Trammel v. United States*: “[W]e cannot escape the reality that the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggest[s] the need for change.”<sup>162</sup> The spousal confidential communications privilege has become such a concept.

To successfully rationalize the spousal confidential communications privilege to reflect twenty-first century norms, the privilege must be limited to apply only to the witness-spouse's election of invocation. In *Trammel*, the Supreme Court recognized that in modern society, the adverse testimony privilege no longer served its originally stated purpose.<sup>163</sup> The Supreme Court then refocused the adverse testimony privilege's purpose by limiting the privilege's invocation to the witness-spouse only to better align with the goals and values of modern society.<sup>164</sup> Similarly, the spousal confidential communication's purpose of promoting marital intimacy and privacy no longer holds up in modern society. However, by limiting the spousal confidential communications privilege to apply only to the witness-spouse, the privilege's purpose can be refocused to reflect the modern societal values of individualism, personal autonomy, and intimacy.

### *B. The Witness-Centered Rationalization*

In 1999, Professor Amanda H. Frost proposed a new way for rationalizing the spousal privileges which she called the witness-centered rationale.<sup>165</sup> This rationale proposes that courts and

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162. 445 U.S. 40, 48 (1980).

163. *Id.* at 52 (“The contemporary justification for affording an accused such a privilege is also unpersuasive.”).

164. *Id.* at 53 (“This modification—vesting the privilege in the witness-spouse—furtheres the important public interest in marital harmony without unduly burdening legitimate law enforcement needs.”)

165. Frost, *supra* note 16, at 5.

legislatures focus the on the perspective of the witness-spouse and value the spousal privileges as a means of accommodating a witness-spouse's choice not to testify.<sup>166</sup> By focusing the privileges' usefulness on individual choice, the spousal privileges are rationalized under a doctrine of excuse rather than any theory of justification.<sup>167</sup> While Professor Frost framed her approach as a way to rationalize a combination of both spousal privileges, the concept behind her approach can be used as a starting point to rationalize the retention of a modernized spousal communications privilege.

### 1. Public Policy Purpose Under an Excuse Doctrine

The witness-centered approach works to rationalize the spousal confidential communications privilege for public policy reasons. As discussed by the *Gutierrez* court, one of the strongest arguments for the spousal confidential communications privilege is that it “eliminates the ‘natural repugnance’ that would necessarily flow from forcing a person to testify against a spouse.”<sup>168</sup> The New Mexico Supreme Court negated this argument by stating that a natural repugnance towards forcing unwilling testimony is “nothing more than sentiment” and that “sentimental feelings do not justify interference with courts’ truth-seeking function.”<sup>169</sup>

Yet while the rules of evidence are intended to aid a court's truth-seeking function, there are certain instances in which public policy rationales take precedence over the need for truth-seeking.<sup>170</sup> For example, many of the specialized relevance evidentiary rules are grounded in public policy rationales, prioritizing decent human behavior over truth-seeking. Federal Rule of Evidence 409 makes inadmissible offers to pay medical expenses because encouraging charitable behavior is more favorable than proving liability.<sup>171</sup> Similarly, Rule 407 makes subsequent remedial measures inadmissible because encouraging safe behavior is more beneficial to society than any use of it as evidence in proving liability.<sup>172</sup>

In a similar vein, by refocusing the spousal communications privilege under a doctrine of excuse rather than a theory of justification, the privilege may continue to eliminate any inherent “natural

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166. *Id.* at 27.

167. *Id.* at 28–29.

168. *State v. Gutierrez*, 482 P.3d 710, 706 (N.M. 2019).

169. *Id.*

170. My thanks to Professor Edward K. Cheng for bringing this point to my attention.

171. FED. R. EVID. 409.

172. FED. R. EVID. 407.

repugnance” but can be reframed under a public policy rationale that makes its interference with the truth-seeking function more understandable to a court. Excuse provides a framework for courts to reconcile a compassion for the witness-spouse with the knowledge that the witness-spouse’s testimony would be better for the truth-seeking function.<sup>173</sup> And modern ideals surrounding individualism and autonomy demonstrate that accommodating a witness-spouse’s choice to not betray their spouse will likely be prioritized by today’s society, thus providing public policy reasons for the privilege’s retention.<sup>174</sup>

## 2. Answering the Privilege’s Criticisms

Viewing the spousal confidential communications privilege under a doctrine of excuse also allows the privilege to be redefined in terms of intimacy, changing the purpose for the privilege. The major criticisms of the spousal confidential communications privilege focus on the privilege’s insufficiency in serving its initial purpose: promoting marital privacy.<sup>175</sup> Unlike other privileged relationships, such as attorney-client or psychotherapist-patient, the marital relationship is not dependent upon the privilege to foster open communication and maintain privacy.<sup>176</sup> Instead of relying upon any spousal testimonial privileges to foster communication, marriage communications are built upon confidence, trust, and intimacy between spouses.<sup>177</sup> Thus, the traditional utilitarian justification for testimonial privileges—that the privileges foster communication within socially beneficial relationships—do not correspond with the actuality of the marriage relationship.<sup>178</sup> Further, humanitarian theories which justify the testimonial privileges for their role in protecting a fundamental right of privacy also fail in justifying the spousal confidential communications privilege. Because the spousal confidential communications privilege is limited in application to intentional communications only, the privilege falls short of actually protecting marital privacy.<sup>179</sup>

However, rationalizing the spousal confidential communications privilege under a doctrine of excuse by focusing the privilege’s

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173. Frost, *supra* note 16, at 29.

174. See *supra* Section III.A.1 (discussing cultural movements that shaped the modern concept of marriage).

175. Story, *supra* note 42, at 305.

176. See *supra* Sections III.A.1 and III.A.2 (discussing how the differences between a marital relationship and other privileged relationships result in flawed logic when attempting to justify the spousal privileges under the traditional justification theories).

177. Story, *supra* note 42, at 307.

178. *Familial Privileges*, *supra* note 13, at 1588.

179. Frost, *supra* note 16, at 25; see *supra* Section III.A.2.

protections on only the witness-spouse redefines the privilege's purpose: protecting an individual's right to choose intimacy.<sup>180</sup> In redefining the privilege's purpose, the criticisms of the spousal confidential communication privilege disappear.

The Supreme Court in *Obergefell* stated “[d]ecisions about marriage are among the most intimate that an individual can make.”<sup>181</sup> As evidenced by 2019 American marriage and divorce statistics,<sup>182</sup> the twenty-first century institution of marriage represents an intimate choice reflecting a true commitment between individuals. And the emphasis that society places upon the individual choice of intimacy further helps in rationalizing the spousal confidential communications privilege's retention into the twenty-first century.

### CONCLUSION

With the New Mexico Supreme Court's 2019 decision to abolish its state spousal confidential communication privilege, the spousal confidential communication privilege's usefulness in the twenty-first century was called into question. New Mexico directing the privilege to its Rules Committee for reconsideration brings a spotlight onto the privilege and its continued existence. Thus, if the privilege is going to survive in the modern era, a new and legitimate rationale is needed to align the privilege with the modern view of marriage. As the New Mexico Rules Committee and any future legislative bodies enter into reconsideration of the spousal confidential communications privilege, this Note attempts to provide a way to rationalize the privilege's retention by proposing a witness-centered approach grounded in individual autonomy.

The spousal confidential communications privilege no longer serves its traditional purposes of promoting marital harmony and privacy between spouses, and the traditional justifications for the privilege fall short in defending these purposes in the modern era. But society's continued high regard for the institution of marriage demonstrates that the spousal confidential communication privilege still serves some purpose and should not be entirely abandoned.

By limiting the privilege's invocation only to witness-spouses and then by examining the privilege under a witness-centered approach, the spousal confidential communications privilege is aligned with the twenty-first century and can be rationalized under a doctrine

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180. See *Familial Privileges*, *supra* note 13, at 1589 (discussing why familial privileges should be defined in terms of intimacy rather than privacy).

181. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015).

182. McGinty, *supra* note 149.

of excuse. Rationalization under a doctrine of excuse modernizes the spousal confidential communication by allowing the privilege to work to accommodate a witness-spouse's choice in testifying. Further, such rationalization provides public policy rationales and allows the privilege to adopt a new purpose of promoting an individual's choice of intimacy. Thus, the spousal confidential communications privilege is repurposed to become useful for the twenty-first century.