

# **“That’s Just Pillow Talk, Baby”: Spousal Privileges and the Right to Privacy in Arkansas\***

## I. INTRODUCTION

*“[T]he right to life has come to mean the right to enjoy life,—the right to be let alone . . . .”*<sup>1</sup>

A simple illustration adequately demonstrates the core issue explored in this comment. Visualize, for one moment, that you work as a practicing physician in Arkansas. One day, you are performing a hysterectomy. During the course of the surgery, you accidentally puncture the patient’s bladder. A few days later, you discuss the surgery with your spouse in the privacy of your own home. Months later, the patient sues you for medical malpractice. During discovery, the attorney representing the plaintiff subpoenas your spouse, compelling her to appear at a deposition where she must testify truthfully as to any statements made by you following the surgery.

The opposing attorney then further compels your spouse to testify as a witness at trial regarding the statements made by you in the privacy of your own home concerning mistakes made during the surgery. Under oath, she discloses those statements, and the weight given by the jury to those statements leads to a verdict in favor of the plaintiff. Your reputation, career, and potentially your marriage are ruined because you were unable to prevent your spouse from testifying against you. Unfortunately, such a situation may be all too real for any number of married defendants throughout Arkansas.

Readers may be unconcerned, at this point, if they are not themselves physicians. However, such a scenario may arise in situations other than medical malpractice litigation because

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1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

Arkansas courts do not grant marital privileges in any civil lawsuit. In Arkansas, a spousal privilege is only granted to a defendant's spouse in criminal proceedings.<sup>2</sup> Specifically, the Arkansas Rules of Evidence grant a criminal defendant the privilege to prevent his or her spouse from being compelled to testify concerning confidential statements made between the two.<sup>3</sup>

For many years, Arkansas courts have refused to extend such privileges to civil proceedings.<sup>4</sup> However, Arkansas must extend the privilege in order to protect both the fundamental right to privacy and the exchanges between spouses made in the context of the marital relationship. Such exchanges often occur during intimate moments related to "intensely private topics."<sup>5</sup>

Marital privileges "recognize the reality of vulnerability [and] dependence" in marital relationships, which are "often described as relationships of confidence and trust."<sup>6</sup> One of the primary purposes of marital privileges "is to promote marriage as a haven" of privacy between spouses with respect to any statements made toward one another.<sup>7</sup> Without such an evidentiary privilege, the trust that is crucial to the survival of the marriage may cease to exist.<sup>8</sup> This could create situations in which spouses "might not confide in their partners or . . . might lie to protect their partners."<sup>9</sup>

In Part II, this comment explores the history of evidentiary privileges in American courts. It discusses the early justifications and legal theories behind the gradual enactment of marital privileges. These justifications illustrate the continued necessity of such privileges in American courts. Part II also analyzes Arkansas's antiquated approach by addressing the statutory and

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2. See ARK. R. EVID. 504(b).

3. Arkansas Rule of Evidence 504(b) states: "An accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse." ARK. R. EVID. 504(b).

4. See *Scott v. State*, 263 Ark. 669, 677, 566 S.W.2d 737, 742 (1978) (en banc) ("Such a privilege can only be exercised by a defendant in a criminal case.").

5. Eileen A. Scallen, *Relational and Informational Privileges and the Case of the Mysterious Meditation Privilege*, 38 LOY. L.A. L. REV. 537, 570 (2004).

6. *Id.*

7. *United States v. Byrd*, 750 F.2d 585, 592-93 (7th Cir. 1984).

8. Elizabeth Kimberley (Khym) Penfil, *In the Light of Reason and Experience: Should Federal Evidence Law Protect Confidential Communications Between Same-Sex Partners?*, 88 MARQ. L. REV. 815, 825-28 (2005).

9. *Id.* at 827-28.

common law of jurisdictions that recognize marital privileges in civil proceedings. Part II further notes that such privileges are an inherent aspect of American law supported by an overwhelming majority of jurisdictions, both state and federal. Part III argues that marital privileges should be allowed in all Arkansas legal proceedings as an intrinsic extension of the generally recognized right to privacy enjoyed by all Arkansans. The Part discusses the evolution of the established right to privacy at both the federal and the state level, focusing specifically on the right’s recognition in Arkansas. Part IV concludes by urging Arkansas courts to adopt a marital privilege modeled after the Uniform Rules of Evidence.

## II. THE DEVELOPMENT OF EVIDENTIARY PRIVILEGES IN AMERICAN LAW

*“For everything there is a season, and a time for every matter under heaven . . . a time to keep silence, and a time to speak . . . .”*<sup>10</sup>

### A. Development of Evidentiary Privileges at Common Law

Confidential communication privileges, as generally defined in American jurisprudence today, serve as “limitation[s] on a court’s ability to compel testimony regarding confidential communications that occur in certain relationships.”<sup>11</sup> They are but one form of “evidentiary privileges,” which “enable parties and potential witnesses to refuse to disclose relevant and material evidence, both at trial and during the course of pretrial discovery.”<sup>12</sup>

Privileges only apply when the benefit of protecting such confidential communications outweighs any obstacles to the hunt for truth during litigation.<sup>13</sup> The primary justification for the privilege doctrine is to encourage open communication between

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10. *Ecclesiastes* 3:1, 7 (English Standard).

11. *Curran v. Pasek*, 886 P.2d 272, 275 (Wyo. 1994).

12. Michael D. Moberly, *Extending a Qualified Evidentiary Privilege to Confidential Communications Between Employees and Their Union Representatives*, 5 NEV. L.J. 508, 508 (2005) (footnotes omitted).

13. *See id.* at 534.

those in certain relationships.<sup>14</sup> In order to establish a legal privilege, four conditions must be 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 communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.<sup>15</sup>

Arkansas Rule of Evidence 501 limits evidentiary privileges by providing that enumerated privileges may be raised only by a person who is attempting to “(1) refuse to be a witness; (2) refuse to disclose any matter; (3) refuse to produce any object or writing; or (4) prevent another from being a witness or disclosing any matter or producing any object or writing.”<sup>16</sup>

American courts adopted evidentiary privileges from English common law, where certain privileges were recognized as early as the sixteenth century.<sup>17</sup> As the practice of presenting testimony to the jury became more prevalent, the practice of deciding cases based on the jurors’ particular familiarity with the events in question slowly withered away.<sup>18</sup>

This growing reliance on the testimony of fact witnesses prompted a “universal” duty to testify when called into court.<sup>19</sup> This, in turn, gradually led to several judicially recognized exceptions to the widespread civic responsibility to appear when summonsed.<sup>20</sup> One such exception was the marital privilege.

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14. See e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (“[The attorney-client privilege’s] purpose is to encourage full and frank communication between attorneys and their clients . . .”).

15. 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2285 (John T. McNaughton ed., rev. ed. 1961).

16. ARK. R. EVID. 501.

17. R. Michael Cassidy, *Reconsidering Spousal Privileges after Crawford*, 33 AM. J. CRIM. L. 339, 355 (2006).

18. *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1455 (1985) [hereinafter *Privileged Communications*].

19. Cassidy, *supra* note 17, at 355.

20. *Privileged Communications*, *supra* note 18, at 1455.

## B. Arguments Against Extending Evidentiary Privileges

Supporters of extending evidentiary privileges have often met staunch resistance from various sources. One of the strongest supporters of evidentiary privileges was Dean Wigmore,<sup>21</sup> who "believed that the benefit gained from furthering [intimate] relationships had to be balanced with the harm to the judicial truth-seeking function."<sup>22</sup> To Wigmore, privileges were "justified only when the harm to the relationship was greater than [the harm] to the judicial process."<sup>23</sup>

Critics of Wigmore's "relationship-based" justification for evidentiary privileges counter by arguing that most ordinary citizens are unaware of their "protected relationships."<sup>24</sup> According to this view, the candor of marital communications is not dependent upon the couples' knowledge of a legally recognized privilege.<sup>25</sup> However, others contend that individuals are far less likely to communicate if they are told that such conversations are not privileged.<sup>26</sup>

Some also argue that a communication should be protected by a privilege merely because the speakers thought their conversation was confidential.<sup>27</sup> However, "[t]he law cannot take into account purely sentimental considerations which might hinder public interests."<sup>28</sup> After all, "[e]videntiary privileges are antithetical to the purposes of [the judiciary's] truth-seeking process."<sup>29</sup> They contend that "[e]vidence is a discipline whose goal is to encourage the introduction of [both] relevant and credible facts," and evidentiary privileges often exclude such

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21. Raymond F. Miller, Comment, *Creating Evidentiary Privileges: An Argument for the Judicial Approach*, 31 CONN. L. REV. 771, 782 (1999).

22. *Id.* at 782-83 (footnote omitted).

23. *Id.* at 783.

24. *Id.*

25. *See id.*

26. *See* Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 915 (1982) (noting studies conducted within the context of the therapist-patient relationship).

27. WILLIAM HAROLD TIEMANN, *THE RIGHT TO SILENCE: PRIVILEGED COMMUNICATION AND THE PASTOR* 76 (1964).

28. *Id.*

29. *See* Miller, *supra* note 21, at 781.

information.<sup>30</sup> As opponents note, “rather than facilitating the illumination of the truth, [privileges] shut out the light.”<sup>31</sup>

However, these apprehensions are moot. In criminal cases, courts generally qualify exclusionary rules such as privileges, conditioning their application upon “a balancing test to determine whether [a defendant’s] right to present evidence” outweighs the privilege.<sup>32</sup> On one hand, courts “evaluate[] the strength of the accused’s interest in presenting the evidence.”<sup>33</sup> On the other hand, courts “weigh[] the countervailing policy considerations.”<sup>34</sup>

Specifically, courts use four factors to determine the strength of the accused’s interests in excluding evidence that may otherwise be admitted: (1) “the availability of alternative, admissible evidence,” (2) “the reliability of the item of evidence,” (3) “the probative value of the item of evidence on the issue it is offered to prove,” and (4) “the importance of the issue the item of evidence is offered to prove.”<sup>35</sup>

In order to continue to protect the recognition of evidentiary privileges while preserving the truth-seeking mission of the judicial system, courts should adopt this balancing test during civil proceedings. Under the first factor—the availability of alternative evidence—courts should allow a confidential marital communications privilege when there is enough equally credible evidence available other than the actual communications in question.<sup>36</sup> Under the second factor—the reliability of the item of evidence otherwise excluded by the privilege—courts should grant the privilege when there is other evidence available with both greater weight and reliability than the communications in question.<sup>37</sup> Under the third factor, courts must consider whether the marital communications strongly support a fact at issue in the case.<sup>38</sup> Spouses should not be compelled to disclose the content of any confidential marital communications if the courts deem the

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30. *See id.*

31. 1 CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 72 (Kenneth S. Brown ed., 7th ed. 2013).

32. 2 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 11.3 (Richard D. Friedman ed., 2d ed. 2010).

33. *Id.*

34. *Id.*

35. *Id.* § 11.3.1(a) (footnotes omitted).

36. *See id.* § 11.3.1(a)(1).

37. *See* 2 IMWINKELRIED, *supra* note 32, § 11.3.1(a)(2).

38. *See id.* § 11.3.1(a)(3).

content of such communications "marginally relevant."<sup>39</sup> Finally, under the fourth factor, courts should grant evidentiary privileges regarding confidential marital communications if they are related to issues that, while important, would not impede a plaintiff's ability to fully present his or her case before the court.<sup>40</sup>

This test allows courts to recognize marital privileges while adequately addressing the fears of critics. As the scope of privileges does not become too broad, the truth-seeking function of the courts would not be destroyed. However, in order to fully understand the arguments regarding marital and evidentiary privileges in general, a discussion regarding their development in the United States legal system is necessary.

### C. Marital Privileges: The Beginning

As the early common law developed, courts eventually recognized that a spouse was not allowed to testify for or against his or her spouse. Courts and commentators initially referred to this as "spousal disqualification."<sup>41</sup> One of the justifications for this testimonial privilege was that of protecting "marital confidences."<sup>42</sup> By the twentieth century, however, such judicial exceptions had fallen out of favor.<sup>43</sup> In fact, the United States Supreme Court, in *Funk v. United States*,<sup>44</sup> abolished spousal disqualifications.<sup>45</sup> As a direct result, a defendant's spouse could be compelled to testify on the plaintiff's behalf.<sup>46</sup> Due to the Court's rejection of the spousal disqualification, courts never found it necessary to recognize a separate privilege for communications made during the marital relationship for much of the twentieth century.<sup>47</sup>

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39. *See id.* (quoting various authority).

40. *See id.* § 11.3.1 (a)(4).

41. *See* Trammel v. United States, 445 U.S. 40, 43-44 (1980); *see also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES § 5.31 (2d ed. 1999) (describing the spousal testimonial privilege).

42. 1 MCCORMICK, *supra* note 31, § 78.

43. Pamela A. Haun, Note, *The Marital Privilege in the Twenty-First Century*, 32 U. MEM. L. REV. 137, 139 (2001).

44. 290 U.S. 371 (1933).

45. *Id.* at 381.

46. *Id.*

47. *See* 8 WIGMORE, *supra* note 15, § 2333.

### 1. Marital Privileges as Developed Under Federal Common Law

In 1934, the United States Supreme Court finally recognized confidential marital communications as a separate, discrete evidentiary privilege.<sup>48</sup> Once this occurred, the broad, generic marital privilege at common law came to be regarded as two distinct privileges: “(1) the privilege against adverse spousal testimony and (2) the confidential marital communications privilege.”<sup>49</sup> The testimonial privilege allows a witness to refuse to testify against his or her spouse in criminal proceedings.<sup>50</sup> It applies to testimony regarding any subject, including “matters that occurred prior to the marriage.”<sup>51</sup> This testimonial privilege was intended to foster and preserve marriages.<sup>52</sup> Thus, this privilege is generally considered terminated upon divorce.<sup>53</sup>

The confidential marital communications privilege prohibits one spouse from testifying as to conversations or communications between spouses made within the context of the marital relationship while the couple is, or was, legally married.<sup>54</sup> Both spouses hold the privilege, and either may object to being compelled to give testimony revealing any private, confidential statements made during the marital relationship.<sup>55</sup> As courts have noted, “[v]esting the privilege in both spouses recognizes that allowing the communicating spouse to disclose one side of a

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48. *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.”).

49. 3 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN’S FEDERAL EVIDENCE* § 505.03 (Joseph M. McLaughlin ed., 2d ed. 2009).

50. *Id.*

51. *Id.*

52. See 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 217 (rev. ed. 1985).

53. 8 WIGMORE, *supra* note 15, § 2334.

54. Cassidy, *supra* note 17, at 357. The confidential marital communications privilege may survive the termination of the marriage. So long as the speakers were legally married at the time of the communication, the privilege may still be applied. 1 MCCORMICK, *supra* note 31, § 85.

55. GLEN WEISSEBERGER, *FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY* § 501.6 (1999). A minority of jurisdictions allow only the party who made the communication to hold the privilege. However, the party who receives the communication is authorized to invoke the privilege on the other’s behalf. See, e.g., TEX. R. EVID. § 504(a).



conversation would eviscerate the privilege.”<sup>56</sup> Two primary justifications support the use of evidentiary privileges: (1) “instrumental” and (2) “humanistic.”<sup>57</sup>

#### a. The Traditional Privilege Justifications: The Instrumental Approach

The instrumental justification for privileges states that witnesses should sometimes be excused from testifying in order to promote and preserve socially valuable relationships such as marriage.<sup>58</sup> These utilitarian legal theorists justify privileges, such as the confidential marital communications privilege, as a means of promoting the public good.<sup>59</sup>

Specifically, they argue that a privilege must “be recognized where the social benefits to be achieved from excusing the witness exceed the social costs of losing the testimony.”<sup>60</sup> Traditionally, instrumental theorists argue that forcing a spouse to testify might produce one of two unsatisfactory results: (1) truthful testimony that leads to the dissolution of the marriage or (2) perjury by a spouse on the witness stand.<sup>61</sup>

Of course, the instrumental theory “assumes that federal evidentiary laws, and specifically the spousal communications privilege, are known and thus have influence over marital behavior.”<sup>62</sup> It also assumes that the destruction of such privileges would discourage spouses from communicating.<sup>63</sup> These common arguments against the instrumental theory encouraged supporters of evidentiary privileges to employ other justifications for their existence, such as the humanistic theory.

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56. *United States v. Montgomery*, 384 F.3d 1050, 1059 (9th Cir. 2004).

57. See Edward J. Imwinkelried, *The Historical Cycle in the Law of Evidentiary Privileges: Will Instrumentalism Come into Conflict with the Modern Humanistic Theories?*, 55 ARK. L. REV. 241, 242-43 (2002); Penfil, *supra* note 8, at 819.

58. See *Trammel v. United States*, 445 U.S. 40, 50 (1980).

59. Cassidy, *supra* note 17, at 358.

60. *Id.*

61. These arguments were recognized by courts as early as 1872. See *Clements v. Marston*, 52 N.H. 31, 35-36 (1872).

62. Jennifer Kelly, Note, *He Said, She Said: Sex Crime Prosecutions and Spousal Privileges Under the Federal Rules of Evidence*, 86 ST. JOHN’S L. REV. 637, 651 (2012).

63. *Id.*

### b. The Traditional Privilege Justifications: The Humanistic Approach

Early English courts relied on humanistic rationales, rather than instrumental principles, to justify the first testimonial privileges. Supporters of this theory argue that “privileges reflect[] the legal system’s respect for human dignity.”<sup>64</sup> The humanistic theory states that it is morally wrong to require a spouse to testify against his or her marital partner “because it forces one spouse to be an instrumentality of their beloved’s demise.”<sup>65</sup> Ultimately, the primary question asked by humanistic scholars is as follows: “[W]hat kind of people are we who empower courts in our name to compel . . . lovers to become informants on those who have trusted in them?”<sup>66</sup>

Compelling testimony from a reluctant spouse is considered by humanistic legal scholars to be an example of “blatant governmental intrusion into private relationships.”<sup>67</sup> With respect to the confidential marital communications privilege, the humanistic justification recognizes that married couples have a right to privacy in their discussions, and such intimate speech should be beyond reach.<sup>68</sup> Commentators have intimated that any intrusions into the marital confidences of a couple offend the couple’s right to privacy.<sup>69</sup>

### 2. Marital Privileges as Developed in the Federal Courts

In the mid-1960s, Chief Justice Warren appointed an Advisory Committee to study and propose a uniform set of evidentiary rules.<sup>70</sup> The rules were to be adopted and promulgated by the Court for use in the nation’s federal courts.<sup>71</sup>

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64. See 1 IMWINKELRIED, *supra* note 32, § 2.3.

65. Cassidy, *supra* note 17, at 360-61.

66. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5422.1 (1st ed. Supp. 2002) (internal quotation marks omitted).

67. *Privileged Communications*, *supra* note 18, at 1584.

68. 1 MCCORMICK, *supra* note 31, § 86 (“Probably the policy of encouraging confidences is not the prime influence in creating and maintaining the privilege . . . . All of us have a feeling of indelicacy and want of decorum in prying into the secrets of husband and wife.”).

69. See 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, 1370-71 (1973).

70. Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 125 (1973).

71. S. REP. NO. 93-1277, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7052.

In 1971, the Advisory Committee and the Standing Committee on Rules of Practice and Procedure sent their final work product to the Court.<sup>72</sup> Chief Justice Burger, Warren’s successor, transmitted the proposed rules to Congress in February 1973.<sup>73</sup>

However, Congress opted to adopt a flexible standard to privilege rules instead of the detailed proposal promulgated by the Court.<sup>74</sup> The most far-reaching change from the original proposed uniform rules submitted to Congress by the Supreme Court was the elimination of the Court’s proposed rules on privileges.<sup>75</sup> As adopted in 1975, Federal Rule of Evidence 501 required courts to assess privileges on a case-by-case basis.<sup>76</sup> Not only must courts treat the recognition of privileges on a case-by-case basis, they must also consider the scope of the privilege in the same manner.<sup>77</sup>

Pursuant to Rule 501, state-law privileges apply in civil proceedings when the privilege relates to any claim or defense for which state law supplies the rule of decision.<sup>78</sup> The rationale for this provision “is that Federal law should not supersede that of the States in substantive areas such as [evidentiary] privilege absent a compelling reason.”<sup>79</sup>

#### D. Marital Privileges in the States

Under Rule 501, marital privileges are recognized or disregarded on the basis of state law. Nineteen states, including Arkansas, have abandoned the long-recognized adverse

72. *Id.*

73. *Id.*

74. 3 WEINSTEIN & BERGER, *supra* note 49, § 501.02.

75. S. REP. NO. 93-1277, *supra* note 71, at 2-3.

76. *See* FED. R. EVID. 501 (1975) (amended 2011). Former Rule 501 stated:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness . . . thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law.

FED. R. EVID. 501 (1975) (amended 2011).

77. *See* *Upjohn Co. v. United States*, 449 U.S. 383, 396-97 (1981); *In re Zuniga*, 714 F.2d 632, 639 (6th Cir. 1983).

78. FED. R. EVID. 501.

79. S. REP. NO. 93-1277, *supra* note 71, at 3.

testimonial marital privilege and currently “proceed[] under the belief that the confidential [marital] communications privilege adequately protects marital privacy.”<sup>80</sup> Presently, all fifty states recognize the confidential marital communications privilege between spouses.<sup>81</sup> In the overwhelming majority of states, this privilege applies in both criminal and civil proceedings.<sup>82</sup> Arkansas, however, is one of only four states that expressly confine the privilege to criminal proceedings.<sup>83</sup>

Before Arkansas adopted the Uniform Rules of Evidence, a spouse was considered incompetent to testify in both criminal and civil cases.<sup>84</sup> Previous Arkansas statutes codified this position.<sup>85</sup> In 1976, Arkansas adopted the Uniform Rules of Evidence to serve as the basis for its own evidentiary rules.<sup>86</sup> Arkansas followed these rules until 1986, when the Arkansas Supreme Court declared in *Ricarte v. State*<sup>87</sup> that the Uniform Rules of Evidence were improperly adopted in 1976.<sup>88</sup> At the time of adoption in January 1976, the Arkansas General Assembly had been unlawfully in session for almost a year after the 1975 regular session had ended.<sup>89</sup> The Arkansas Constitution did not permit the practice of the legislature continuing to meet after its regular sixty-day session had ended.<sup>90</sup>

The *Ricarte* court stated that it was concerned with “the topsy-turvy condition that would come about if the Uniform

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80. Cassidy, *supra* note 17, at 364-65; *see also* Huckaby v. State, 262 Ark. 413, 416-17, 557 S.W.2d 875, 877-78 (1977) (en banc) (holding that Rule 504 limited the marital privilege to confidential communication and did not prevent an individual from testifying against his or her spouse).

81. Cassidy, *supra* note 17, at 365-66. No such privilege is expressly created by statute in Connecticut and Rhode Island, but both states continue to recognize a common-law privilege for confidential communications. *See, e.g.*, State v. Christian, 841 A.2d 1158, 1173 (Conn. 2004); State v. DeSlovers, 100 A. 64, 71-72 (R.I. 1917).

82. Cassidy, *supra* note 17, at 366.

83. *See* OKLA. STAT. ANN. tit. 12, § 2504 (West 2014); S.D. CODIFIED LAWS § 19-13-13 (2014); ARK. R. EVID. 504; N.D. R. EVID. 504.

84. MORT GITELMAN ET AL., ARKANSAS RULES OF EVIDENCE WITH COMMENTARY AND ANNOTATIONS 107 (1988).

85. *See* ARK. STAT. ANN. § 28-601 (Repl. 1962); ARK. STAT. ANN. § 43-2019 (Repl. 1964).

86. Act 1143, 1975 vol. II Ark. Acts 2799, 2788-2849.

87. 290 Ark. 100, 717 S.W.2d 488 (1986).

88. *Id.* at 103, 717 S.W.2d at 489 (“The Uniform Rules of Evidence were adopted at an invalid session of the legislature.”).

89. *Id.*

90. *Id.*

Rules were abruptly cast out.”<sup>91</sup> In order to avoid any unfortunate results of repealing the evidentiary rules, the court, under its own rule-making power and authority, adopted the Uniform Rules of Evidence as the law in Arkansas.<sup>92</sup> Arkansas Rule of Evidence 504 discards any approach that renders a spouse incompetent and substitutes a privilege for confidential communications, but only between spouses in criminal cases.<sup>93</sup>

Under the previous approach, “if an accused defendant married the victim just before trial, the victim could not testify; conversely, if an accused and his spouse were divorced just . . . before trial, the former spouse could testify about the most intimate confidential communications.”<sup>94</sup> Under current Rule 504, the results in these two situations are the opposite.<sup>95</sup> Thus, by adopting Rule 504 and repealing the codified privileges of the previous evidentiary rules, the state abandoned the recognition of marital privileges in civil cases.<sup>96</sup>

Evidentiary privileges, such as the confidential marital communications privilege, personify the high regard in which American society holds individual rights, especially the right to

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91. *Id.* at 104, 717 S.W.2d at 489.

92. *Ricarte*, 290 Ark. at 104, 717 S.W.2d at 489. On the same day, the court issued a per curiam opinion, styled *In re Adoption of the Uniform Rules of Evidence*, 290 Ark. 616, 717 S.W.2d 491 (1986), which stated, in pertinent part:

As explained in today’s opinion in *Ricarte v. State* . . . the court under its statutory and rule-making authority adopts the Uniform Rules of Evidence as they are set forth in Act 1143 of 1975 (Extended Session, 1976). The Rules will be applicable as stated in Rule 1101. Rule 1102 is changed to read: “These rules shall be known as the Arkansas Rules of Evidence and may be cited as A.R.E. Rule \_\_\_\_.”

93. GITELMAN ET AL., *supra* note 84, at 107.

94. *Id.*

95. *Id.*

96. *Id.*

privacy<sup>97</sup> and belief in complete autonomy.<sup>98</sup> For this reason, Arkansas courts must extend evidentiary privileges to protect confidential marital communications in civil proceedings.

### III. THE RIGHT TO PRIVACY AND MARITAL PRIVILEGES

*"I have often regretted my speech, never my silence."*<sup>99</sup>

#### A. The Right to Privacy as a Constitutional Right

Individual rights were not offered robust constitutional protection in the United States for much of the nation's early history.<sup>100</sup> The modern concept of a "right to privacy" was truly articulated for the first time in 1890 by Samuel Warren and Louis Brandeis in their seminal article entitled *The Right to Privacy*.<sup>101</sup> The right described by the pair relied on every individual's need

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97. The "right to privacy" may be characterized as:

[T]he right of the individual to be free in his private affairs from governmental surveillance and intrusion. . . . the right of an individual not to have his private affairs made public by the government. . . . [and] the right of an individual to be free in action, thought, experience, and belief from governmental compulsion.

Phillip B. Kurland, *The Private I: Some Reflections on Privacy and the Constitution*, U. CHI. MAG., Autumn 1976, at 7, 8. The constitutionally recognized right to privacy includes due process rights under the Fifth and Fourteenth Amendments, as well as the Fourth Amendment protection against illegal searches and seizures. See U.S. CONST. amend. IV, U.S. CONST. amend. V; U.S. CONST. amend. XIV. The United States Supreme Court has recognized the right to privacy in numerous cases. See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 566-68 (1969) (concluding that the right to privacy includes the right to receive information and ideas regardless of their social worth); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (describing the Fourth Amendment right to privacy as protecting "the right to be let alone"). See generally Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (summarizing the development of the doctrine).

98. See Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 92 (1973).

99. Publilius Syrus, quoted in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 127 (14th ed. 1968).

100. Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1410-11 (1974). The United States Supreme Court recognized some rights to privacy in *Boyd v. United States*, 116 U.S. 616, 630 (1886), but it was not until the landmark piece by Samuel D. Warren and Louis D. Brandeis, the latter of whom later became a Justice of the Court, that the concept of privacy as a discrete, fundamental right emerged in American legal culture.

101. See generally Warren & Brandeis, *supra* note 1.

for freedom from the demands of society at large in order to develop personal "beliefs, attitudes, and behavioral norms."<sup>102</sup>

Further, the right to privacy protected both "personal information in the space of intimate associations" and "against disclosure outside that space."<sup>103</sup> Many courts were unimpressed and hesitated to accept what were considered revolutionary views. In the first case to address the arguments advanced by Warren and Brandeis, *Roberson v. Rochester Folding Box Co.*,<sup>104</sup> the New York Court of Appeals severely criticized the theory, and the majority stated that such a right to privacy would produce unlimited, unnecessary litigation.<sup>105</sup> The *Roberson* court declined to recognize any such right to privacy, believing the arguments and interpretations advanced by Warren and Brandeis to be lacking in precedent.<sup>106</sup> However, the fears of a litigation explosion were unfounded, as Warren and Brandeis limited their own proposed "right to privacy" to an established "zone of privacy" that only "encompassed the home and such personal matters as one's physical condition, family affairs, and intense emotions, like shock and grief."<sup>107</sup>

Three years after *Roberson*, the Supreme Court of Georgia became the first court to recognize a common-law right to privacy. It rejected the approach of the New York Court of Appeals and unanimously approved of the theory described by Warren and Brandeis in *Pavesich v. New England Life Insurance*

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102. Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890–1990*, 80 CAL. L. REV. 1133, 1134 (1992).

103. *Id.* at 1135 (emphasis omitted).

104. 64 N.E. 442 (N.Y. 1902).

105. *Id.* at 443. Specifically, the court stated:

If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations or habits. And, were the right of privacy once legally asserted, it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely let alone.

*Id.*

106. *Id.*

107. Samantha Barbas, *Saving Privacy from History*, 61 DEPAUL L. REV. 973, 992 (2012).

*Co.*<sup>108</sup> In the case, the court held in favor of a plaintiff who argued that an insurance company violated his right to privacy when it used his name, picture, and a false testimonial in a newspaper advertisement without obtaining his consent.<sup>109</sup>

The court tersely condemned the *Roberson* decision as “the result of an unconscious yielding to the feeling of conservatism which naturally arises in the mind of a judge who faces a proposition which is novel.”<sup>110</sup> The court believed that such “conservatism” must not refuse to acknowledge a right instinctually believed to exist, and whose nonexistence has yet to be proven.<sup>111</sup> Consequently, the court recognized a right to privacy as being “derived from natural law.”<sup>112</sup> By 1939, the American Law Institute opted to follow the *Pavesich* approach and codified the right to privacy in the Restatement of Torts.<sup>113</sup> The boundaries established by the American Law Institute in the Restatement echoed those first articulated by Warren and Brandeis.<sup>114</sup> Specifically, the Restatement protected against “unreasonabl[e] and serious[] interfere[nce] with another’s interest in not having his affairs known to others.”<sup>115</sup>

Thus, an individual’s “personal affairs,” which would include his or her “family affairs,” were part of the constitutionally protected right to privacy. However, even though other courts continued to follow Warren and Brandeis, it was not until 1965 that the United States Supreme Court recognized a “right to privacy” as a constitutionally protected right in *Griswold v. Connecticut*.<sup>116</sup>

Justice Douglas, writing for the majority, found a right to privacy in various provisions of the Bill of Rights, without which “the specific rights would be less secure.”<sup>117</sup> According to the majority, these constitutional guarantees created “zones of privacy.”<sup>118</sup> Specifically, the Fourth and Fifth Amendments to

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108. 50 S.E. 68 (Ga. 1905).

109. *Id.* at 78-79.

110. *Id.* at 78.

111. *Id.*

112. *Id.* at 70.

113. See RESTATEMENT (FIRST) OF TORTS § 867 (1939).

114. See *id.*

115. *Id.*

116. 381 U.S. 479 (1965).

117. *Id.* at 482-83.

118. *Id.* at 484.



the United States Constitution protected “against all governmental invasions of the sanctity of a man’s home and the privacies of life.”<sup>119</sup> Such a right to privacy was considered “no less important than any other right carefully and particularly reserved to the people.”<sup>120</sup>

Although *Griswold* did not expressly extend the right to privacy to the marital relationship, the Court did emphasize that the legislation in question interfered with the most intimate aspect of a sacred relationship.<sup>121</sup> Justice Douglas described the Court’s respect for the marital relationship in the following way:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>122</sup>

A decade after *Griswold*, the Court recognized an essential right to confidentiality as an extension of the constitutional right to privacy. The majority in *Whalen v. Roe*<sup>123</sup> stated that the right to privacy included an “individual interest in avoiding disclosure of personal matters.”<sup>124</sup> In *Paul v. Davis*,<sup>125</sup> the Court explicitly stated that fundamental privacy interests included familial relationships.<sup>126</sup>

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119. *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)) (internal quotation marks omitted).

120. *Id.* at 485 (quoting *Mapp v. Ohio*, 367 U.S. 643, 656 (1961)) (internal quotation mark omitted).

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

122. *Id.* at 486.

123. 429 U.S. 589 (1977).

124. *Id.* at 599.

125. 424 U.S. 693 (1976).

126. *Id.* at 713.

### B. Arkansas Recognizes the Right to Privacy as a Constitutional Right

The Arkansas Constitution does not explicitly establish a right to privacy.<sup>127</sup> However, article 2, section 29 of the Arkansas Constitution states that the rights enumerated in its other sections must not be construed in such a way as to deny or disparage other rights retained by the people.<sup>128</sup> Arkansas dealt with several right to privacy issues before any such right was recognized. In *McCambridge v. City of Little Rock*,<sup>129</sup> the Arkansas Supreme Court recognized “a constitutional right to non-disclosure of personal matters.”<sup>130</sup> According to the court, “a personal matter was a matter ‘personal in character and potentially embarrassing or harmful if disclosed.’”<sup>131</sup>

In *Jegley v. Picado*,<sup>132</sup> the Arkansas Supreme Court assessed whether any language from the Arkansas Constitution created an inherent right to privacy as a constitutional guarantee in the state.<sup>133</sup> To do so, it first had to “examine the development of a right to privacy in the statutes, rules, and case law of [the] state.”<sup>134</sup> In *Jegley*, the plaintiffs, seven gay and lesbian Arkansans, moved for summary judgment pursuant to Arkansas Rule of Civil Procedure 56 on their constitutional challenge to Arkansas Code Annotated section 5-14-122, “which criminalize[d] consensual sodomy only between people of the same sex.”<sup>135</sup> The Arkansas General Assembly enacted the statute in 1977, and the plaintiffs argued that it criminalized their

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127. *Jegley v. Picado*, 349 Ark. 600, 624, 80 S.W.3d 332, 344 (2002).

128. The language reads, in pertinent part:

This enumeration of rights shall not be construed to deny or disparage others retained by the people; and to guard against any encroachments on the rights herein retained, or any transgression of any of the higher powers herein delegated, we declare that everything in this article is excepted out of the general powers of the government; and shall forever remain inviolate; and that all laws contrary thereto, or to the other provisions herein contained, shall be void.

ARK. CONST. art. 2, § 29.

129. 298 Ark. 219, 766 S.W.2d 909 (1989).

130. *Id.* at 229, 766 S.W.2d at 914 (citing *Whalen v. Roe*, 429 U.S. 589, 589 (1977)).

131. *Id.* at 230, 766 S.W.2d at 914 (quoting *Whalen*, 429 U.S. at 605).

132. 349 Ark. 600, 80 S.W.3d 332 (2002).

133. *Id.* at 627, 80 S.W.3d at 347.

134. *Id.* at 628, 80 S.W.3d at 346-47.

135. Appellant’s Abstract and Brief at 32, *Jegley*, 349 Ark. 600, 80 S.W.3d 332 (No. 01-815), 2001 WL 34630811.

sexual intimacy in violation of their fundamental right to privacy protected by the federal and state constitutions.<sup>136</sup>

First, the court looked to other constitutional provisions to determine whether a right to privacy was inherent under the Arkansas Constitution.<sup>137</sup> It determined that “[a]rticle 2, [s]ection 2 guarantee[d] [Arkansas] citizens certain inherent and inalienable rights, including the enjoyment of life and liberty and the pursuit of happiness.”<sup>138</sup> The court also ruled that the Arkansas Constitution “recognize[d] the right of persons to be secure in the privacy of their own homes.”<sup>139</sup>

The court then analyzed other sources of law to determine whether Arkansas recognized a right to privacy.<sup>140</sup> First, the court noted that “[p]rivacy is mentioned in more than eighty statutes enacted by the Arkansas General Assembly.”<sup>141</sup> The court also recalled previous holdings regarding Arkansas Rule of Criminal Procedure 8.1, which “ha[d] as its purpose to afford an arrestee protection against an unfounded invasion of liberty and privacy . . . basic and fundamental rights which our state and federal constitutions secure to every arrestee.”<sup>142</sup>

Case law also supported the notion that Arkansas recognized a right to privacy, as the court had previously held that “[t]he privacy of the citizens in their homes . . . [was] a right of vast importance as attested not only by our Rules but also by our state and federal constitutions.”<sup>143</sup> The court had also noted that an individual’s privacy interests “exempt[] disclosure of personnel records only when an unwarranted invasion of individual privacy would result.”<sup>144</sup> In fact, the court had previously concluded that

136. *Id.*

137. *Jegley*, 349 Ark. at 627, 80 S.W.3d at 347.

138. *Id.*

139. *Id.* at 628, 80 S.W.3d at 347. This finding was based on article 2, section 15 of the Arkansas Constitution, which states, in part, “[t]he right of the people of this State to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” ARK. CONST. art. 2, § 15.

140. *Jegley*, 349 Ark. at 628, 80 S.W.3d at 347.

141. *Id.* (footnote omitted). The court then declared that “[t]his frequent reference to the right to privacy indicate[d] a public policy of the General Assembly supporting a right to privacy.” *Id.* at 628-29, 80 S.W.3d at 347-48.

142. *Id.* at 630, 80 S.W.3d at 348 (quoting *Bolden v. State*, 262 Ark. 718, 724, 561 S.W.2d 281, 284 (1978)) (internal quotation marks omitted).

143. *Id.* at 631, 80 S.W.3d at 349 (quoting *Fouse v. State*, 337 Ark. 13, 23, 989 S.W.2d 146, 150-51 (1999); *Garner v. State*, 307 Ark. 353, 358-59, 820 S.W.2d 446, 449-50 (1991)) (internal quotation marks omitted).

144. *Id.*

the individual right to privacy was recognized only after balancing that interest against the public's right to knowledge.<sup>145</sup>

Based on this analysis of the law, the court stated, "Arkansas has a rich and compelling tradition of protecting individual privacy and that a fundamental right to privacy is implicit in the Arkansas Constitution."<sup>146</sup> Specifically, the *Jegley* court found Arkansas recognized "the existence of four actionable forms of the tort of invasion of privacy: (1) appropriation; (2) intrusion; (3) public disclosure of private facts; and (4) false light in the public eye."<sup>147</sup> For the purposes of this comment, only the intrusion action will be discussed. Arkansas courts consider "intrusion" to consist of an interference with the "solitude or seclusion" of another.<sup>148</sup> Under Arkansas law, a "legitimate expectation of privacy is the 'touchstone' of the tort of intrusion."<sup>149</sup>

A party must prove five elements to recover for the tort of intrusion: (1) that he or she sustained damages; (2) that the defendant intruded upon his or her solitude or seclusion without permission or authority; (3) that the intrusion was of highly offensive or objectionable nature to a reasonable person; (4) that the party who claimed his right to privacy was intruded acted with an actual expectation of privacy; and (5) that the other person's intrusion was the proximate cause of the damages.<sup>150</sup>

### C. Compelling Spouses to Disclose Confidential Communications: A Violation of the Right to Privacy

Forcing a spouse to testify as to any confidential communications made in the context of the privacy of marriage is an unreasonable intrusion upon the marital relationship. It is intentional, substantial, and highly offensive to a reasonable person. Such a compulsion invades a highly valued social interest—the marital relationship—in which there must be a reasonable expectation of privacy.

A reasonable expectation of privacy exists in every marital relationship, and this expectation is strengthened by the

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145. See *Jegley*, 349 Ark. at 631, 80 S.W.3d at 349.

146. *Id.* at 631-32, 80 S.W.3d at 349-50.

147. *Id.* at 631, 80 S.W.3d at 349.

148. *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 720, 74 S.W.3d 634, 644 (2002).

149. *Id.* (quoting *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 877 (8th Cir. 2000)).

150. ARK. MODEL JURY INSTRUCTIONS—CIVIL 420 (2011).

importance of "solace' provided by a feeling of security in marital confidences."<sup>151</sup> Because of the reasonable expectation of privacy enjoyed by spouses in every marital relationship, any compulsion to testify on the part of either spouse is "highly offensive to a reasonable person"<sup>152</sup> and outrageous to a person "of ordinary sensibilities."<sup>153</sup>

Such disclosures are "outrageous to a person of ordinary sensibilities" because the disclosure of one's secrets in an established relationship, such as marriage, is often considered a "betrayal" of the marital relationship.<sup>154</sup> Psychologically, such betrayals are perceived as severe "interpersonal rejection[s] with potentially serious consequences for the healthy functioning" of the spouse whose confidential statements were revealed.<sup>155</sup> This is due to the fact that such betrayals arise according to the "theories, beliefs, and expectations about how relationships in general . . . should work, and also in people's trust that their partners will . . . meet those expectations."<sup>156</sup>

Disclosure of confidential communications made in the marital relationship is considered a betrayal that "trigger[s] feelings of rejection, abandonment, and aloneness."<sup>157</sup> The intimate nature of the marital relationship evokes these intense psychological feelings because the implications of such a disclosure of the marital confidences are "especially painful."<sup>158</sup> As commentators have noted, "[t]he person to whom [the spouse

151. *United States v. Byrd*, 750 F.2d 585, 592-93 (7th Cir. 1984).

152. RESTATEMENT (SECOND) OF TORTS § 652B (1977). To interpret the "highly offensive to a reasonable person" standard, courts analyze all available factors, such as "the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." *See Bauer v. Ford Motor Credit Co.*, 149 F. Supp. 2d 1106, 1109 (D. Minn. 2001); *see also Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 493-94 (Cal. 1998) (discussing circumstances in which a reporter's intrusion into private matters would be offensive).

153. *See Shorter v. Retail Credit Co.*, 251 F. Supp. 329, 332 (D.S.C. 1966); *Logan v. Sears, Roebuck & Co.*, 466 So. 2d 121, 123 (Ala. 1985).

154. *See Julie Fitness, Betrayal, Rejection, Revenge, and Forgiveness: An Interpersonal Script Approach*, in INTERPERSONAL REJECTION 73, 73 (Mark. R. Leary ed., 2001).

155. *Id.* at 74.

156. *Id.* at 75.

157. *Id.* Some courts have found that there is a "natural repugnance" in forcing one spouse to testify against his or her "intimate life partner" and consider such testimony a betrayal. *See Penfil, supra* note 8, at 827 (quoting 8 WIGMORE, *supra* note 15, §§ 2228, 2333).

158. *Fitness, supra* note 154, at 75.

had] disclosed and entrusted [his or her] deepest fears and vulnerabilities appears neither to care about [the marital] relationship nor to be committed to it.”<sup>159</sup>

Accordingly, betrayal occurs in intimate relationships “if one or the other party violates salient relational expectations or ‘breaks the rules’ in some way.”<sup>160</sup> Such rules include respecting privacy and “sharing confidences but not disclosing them to others.”<sup>161</sup> Studies indicate that the disclosure of private, confidential communications, considered a “betrayal” of the relationship, leads to feelings of abandonment on the part of the person whose statements were revealed.<sup>162</sup> Studies also demonstrate that a majority of betrayed spouses suffer substantial harm to their self-image and confidence.<sup>163</sup>

These feelings of betrayal are likely felt by Arkansas citizens whose spouses disclose the nature of any confidential statements made in the privacy of the marriage. Therefore, any public disclosure of confidential communications made in the privacy of the marital relationship is “outrageous to a person of ordinary sensibilities.” A majority of married individuals consider such disclosures a “betrayal” of the relationship, and feelings of distrust, isolation, loneliness, and abandonment in the betrayed partner follow in short order.<sup>164</sup>

By allowing such public disclosures in civil proceedings, Arkansas puts the mental well-being—as well as the marital satisfaction—of its married citizens at risk. The state continues to allow unreasonable intrusions into the privacy of the marital relationship to be routinely committed, with no protection whatsoever for the privacy rights of its married residents.

Compelling a spouse to testify represents an unreasonable intrusion upon the seclusion of the marital relationship, and the other elements of an intrusion action in Arkansas are also met. The intent element of an intrusion upon seclusion action is satisfied simply through the knowledge, or substantial certainty, of an intrusion on the part of both the court and the attorney forcing the spouse to reveal confidential marital

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159. *Id.*

160. *Id.* at 77.

161. *Id.*

162. *Id.* at 95 (noting various studies).

163. Fitness, *supra* note 154, at 95 (noting various studies).

164. *See id.*

communications.<sup>165</sup> At this point, the parties know that an intrusion upon the privacy of the marital relationship will occur.

Moreover, with intentional torts in general, the requirement of intent only applies to the invasion of the protected interest—in this case the plaintiff’s “solitude or seclusion . . . or his private affairs or concerns.”<sup>166</sup> The fact that such an intrusion contains no malice is disregarded, as malice is not a required element of intrusion, nor is its absence a defense.<sup>167</sup>

An intrusion upon the marital relationship by the Arkansas courts need not involve an actual physical entry into the marital residence. Scholars note that “[n]umerous cases of actionable intrusions involve non-trespassory intrusions upon or into a physical environment or location in which plaintiff has a reasonable expectation of privacy.”<sup>168</sup> The drafters of Restatement (Second) of Torts adopted this general position.<sup>169</sup>

The Restatement (Second) of Torts provides several illustrations of “non-trespassory intrusions” upon a defendant’s privacy. For example, “opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents” are all instances in which an intrusion upon an individual’s privacy occurs without an actual physical invasion.<sup>170</sup>

Critics of this approach may argue that it represents too broad a proposal—that implementing a confidential marital communications privilege based on the constitutional right to privacy creates an absolute right that would potentially override the truth-seeking mission of the courts. However, these concerns are misplaced. Even the leading supporters of legal protection for privacy concede that privacy rights should not be classified as

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165. See RESTATEMENT (SECOND) OF TORTS § 8A (1965) (“The word ‘intent’ is used . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”)

166. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

167. *Snakenberg v. Hartford Cas. Ins. Co.*, 383 S.E.2d 2, 6-7 (S.C. Ct. App. 1989).

168. DAVID A. ELDER, *PRIVACY TORTS* § 2:6 (2002) (internal quotation marks omitted).

169. See RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977) (“The invasion [of privacy] may be by physical intrusion . . . . It may also be by the use of the defendant’s senses, with or without mechanical aids, to oversee or overhear the plaintiff’s private affairs . . . . It may be by some other form of investigation or examination into his private concerns . . . .”).

170. *Id.*

absolute.<sup>171</sup> While privacy is considered a protected interest,<sup>172</sup> it is in reality a qualified right to be balanced<sup>173</sup> against countervailing interests such as public safety and health.<sup>174</sup>

Therefore, a spouse's right to privacy and autonomy, while critically important, must be qualified by what is commonly known as John Stuart Mill's harm principle. Under this theory, "society may limit an individual's right when the exercise of the right will probably harm a third party."<sup>175</sup> This must override, however, any interest society has in recognizing the right to privacy.<sup>176</sup>

Society has a profound interest in recognizing the constitutional right to privacy. Privacy "promote[s] liberty in ways that enhance the capacity of individuals to create and maintain human relations of different intensities."<sup>177</sup> Individuals display "a plurality of roles and presentations to the world," all of which their right to privacy promotes.<sup>178</sup> Privacy also "enabl[es] individuals to continue relationships, especially those highest in one's emotional hierarchy."<sup>179</sup>

Privacy affords marital partners the opportunity to enjoy their relationship without fear of their inner thoughts, doubts, or wishes being shared with others. They are permitted to do what they would likely not do without privacy for fear of an unpleasant or hostile reaction from others.<sup>180</sup> Such trust in one's spouse is central to the marital relationship, as "[i]n matrimonial life trust has been recognized as an important determinant" in marital satisfaction, which is of prodigious importance to society.<sup>181</sup>

Americans "desire a society in which individuals can grow, maintain their mental health and autonomy, create and maintain human relations, and lead meaningful lives."<sup>182</sup> Privacy is necessary for individuals to enjoy such things, and thus privacy is

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171. 1 IMWINKELRIED, *supra* note 32, § 5.4.4.

172. See AMITAI ETZIONI, *THE LIMITS OF PRIVACY* 3 (1999).

173. See *id.* at 2-4.

174. See *id.* at 4.

175. 1 IMWINKELRIED, *supra* note 32, § 5.4.4.

176. See *id.*

177. Ruth Gavison, *Privacy and the Limits of Law*, 89 *YALE L.J.* 421, 450 (1980).

178. *Id.*

179. *Id.*

180. See *id.* at 451.

181. Mohsin Atta et al., *Role of Trust in Marital Satisfaction Among Single and Dual-Career Couples*, 2 *INT'L. J. RES. STUD. PSYCHOL.* 53, 54 (2013).

182. Gavison, *supra* note 177, at 455.



not only the reality of a "pluralistic, tolerant society"—it is also the central contributing factor.<sup>183</sup> As commentators have suggested, "privacy must be part of our commitment to individual freedom and to a society that is committed to the protection of such freedom."<sup>184</sup>

Privacy rights must be recognized as fundamental in the context of the marital relationship because they "foster[] and encourage[] the moral autonomy of the citizen."<sup>185</sup> The case for applying an evidentiary privilege to the marital relationship is directly tied to the democratic value of personal autonomy.<sup>186</sup> As such, a state, such as Arkansas, that belongs to one of the oldest democracies in modern history must recognize such rights. After all, that is one of the essential ingredients of a democracy. Democratic societies deem the marriage relationship as one of the most sacred.<sup>187</sup> To their citizens, it is especially controversial when any branch of government, the judiciary included, attempts to intrude upon the privacy of that relationship.<sup>188</sup> The family, and the marital relationship by necessity, functions as an "enclave" of freedom,<sup>189</sup> which serves as an extension of an individual spouse's own personal autonomy.<sup>190</sup>

A government may restrict certain activities, but if it is to remain a democracy, it must also allow some form of liberty for political action.<sup>191</sup> This liberty requires privacy, for individuals must have the right to keep their intimate relationships private in order to exercise their personal liberty and autonomy to the

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183. *See id.*

184. *Id.*

185. *Id.*

186. 25 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5594 (1989).

187. RICHARD F. HIXSON, PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT 36-37 (1987).

188. *See e.g.*, Ellen Rosen, *SEC Looks at Marital Confidences and Audit Committees*, NAT'L L.J., Oct. 18, 1999, at 8, 8 (discussing whether the SEC should recognize a marital privilege to limit the scope of insider trading liability).

189. 25 WRIGHT & GRAHAM, *supra* note 186, § 5592.

190. Several "within-person" studies revealed that an individual's social environment has substantial effects upon autonomy and that variations in autonomy support across intimate relationships, such as marriage, accurately predicted relationship satisfaction. *See* Richard M. Ryan & Edward L. Deci, *Self-Regulation and the Problem of Human Autonomy: Does Psychology Need Choice, Self-Determination, and Will?*, 74 J. PERSONALITY 1557, 1567 (2006).

191. *See* Gavison, *supra* note 177, at 455.

fullest.<sup>192</sup> Denying the privacy necessary for the exercise of individual autonomy undermines the entire democratic process.<sup>193</sup>

#### D. Possible Arguments Against the Extension of Marital Privileges Through the Right to Privacy

Some might argue that extending marital privileges to civil proceedings in Arkansas on the basis of the constitutional right to privacy is unnecessary. Although courts have ruled that the existence of this right to privacy is “relatively well-established,”<sup>194</sup> the issue is not entirely settled.<sup>195</sup> Opponents assert that even the courts positing the existence of the right concede that its scope is unsettled, albeit considered to include “the most intimate” information.<sup>196</sup>

To these opponents, the theory underlying the constitutional right to privacy seems to rest upon Dean Wigmore’s instrumental theory for privileges.<sup>197</sup> If that is the case, the argument would simply exploit the inherent weakness in the instrumental theory. Empirical studies indicate that in the typical case, the lack of a privilege does not deter a layperson from communicating with a confidant such as a spouse.<sup>198</sup>

However, courts can place new emphasis on a humanistic rationale while still applying the instrumental theory when necessitated by the facts of an individual case. Such may be the case when circumstances indicate that the spouse in question

192. *See id.*

193. *See id.*

194. 1 IMWINKELREID, *supra* note 32, § 5.3.2; RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW: CASES AND MATERIALS* 150 (2d ed. 1999) (“[A] significant number of federal and state appellate courts have embraced the notion that encroachments on informational privacy by government action that does not constitute a search may violate a constitutional right to privacy under either the state or federal constitutions.”); *see also* *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) (“This right to privacy actually encompasses two separate types of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.” (citation omitted)).

195. 1 IMWINKELRIED, *supra* note 32, § 5.3.2 (“[T]he issue is not settled as a matter of Supreme Court jurisprudence.”).

196. *Wade v. Goodwin*, 843 F.2d 1150, 1153 (8th Cir. 1988); *see also* *Livsey v. Salt Lake Cty.*, 275 F.3d 952, 956 (10th Cir. 2001) (“[P]rivacy for constitutional purposes is legitimate only if the information is ‘highly personal or intimate.’” (quoting *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995))).

197. *See* 1 IMWINKELRIED, *supra* note 32, § 5.3.2.

198. *See id.*

would not have shared such confidential communications “but for the existence of a privilege.”<sup>199</sup> Courts should examine each case individually to determine, from a humanistic perspective, whether there has been a blatant governmental intrusion into the private marital relationship.

If the married couple’s right to privacy has been intruded upon—based upon an analysis of Arkansas’s elements of intrusion—any evidence obtained pursuant to that intrusion must be excluded through a marital confidential communications privilege. However, if no such intrusion occurred, the spouses would still be able to assert such a privilege in civil proceedings in Arkansas. This could occur pursuant to an evidentiary rule granting such privileges in civil proceedings, such as the rule proposed in the conclusion to this comment. The privilege, however, would not be absolute. Judges would consider four factors from the test previously discussed: (1) the availability of alternative admissible evidence; (2) the reliability of the item of evidence otherwise excluded by the privilege; (3) the probative value of the item of evidence on the issue it is offered to prove; and (4) the importance of the issue that the item of evidence is offered to prove.<sup>200</sup> If the spousal claim of a confidential marital communications privilege fails this test, any statements are admissible in court.

With this proposal, the privacy of Arkansas’s married citizens will be more adequately protected because courts would be required to more carefully approach the issue of whether such statements are shielded under a confidential marital communications privilege. The privilege, however, would not be absolute; it would still be subject to limitations based upon a court’s case-by-case analysis. As a result, the truth-seeking function of the courts is preserved when the claim of the privilege’s existence fails to satisfy the elements of the proposed four-part test.

#### IV. CONCLUSION

The constitutional right to privacy will compel Arkansas courts to analyze, with greater precision, whether a communication between spouses should ever be elevated to the

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199. *Id.*

200. *Id.* § 11.3.1.

level of privileged status. Under the basic principles of privacy, “rights as well as interests are personal to the holder of the privilege.”<sup>201</sup>

In order to truly protect the constitutional right to privacy, the Arkansas judiciary need look no further than the original text of the Uniform Rules of Evidence to incorporate a “confidential marital communications” privilege for civil proceedings. Specifically, the courts should adopt the language found in original Rule 504(a) of the Uniform Rules, which reads:

(a) Marital communications. An individual has a privilege to refuse to testify or to prevent his or her spouse or former spouse from testifying as to any confidential communication made by the individual to the spouse during their marriage. The privilege may be waived only by the individual holding the privilege or by the holder’s guardian, conservator, or personal representative. A communication is confidential if it is made privately by an individual to his or her spouse and is not intended for disclosure to any other person.<sup>202</sup>

Marriage is one of the most rewarding relationships in society.<sup>203</sup> It is also one of the most private. Spouses rely on this privacy when they are conversing in the comforts of their own home. This reliance occurs regardless of whether or not they are aware of the existence of some privilege that protects such confidential communications.

In a modern, democratic society, the need to protect the privacy and personal autonomy of married citizens carries substantially more importance than the concern for the truth-seeking function of the judiciary. When a governing body grants such unreasonable intrusions into the marital privacy of its citizens, the vestiges of democracy are slowly chipped away. All that remains are the first fruits of an autocratic police state.

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201. James J. Dalessio, Comment, *Evidentiary Privileges and the Exclusion of Derivative Evidence: Commentary and Analysis*, 26 SAN DIEGO L. REV. 625, 637 (1989).

202. UNIF. R. EVID. 504 (1974) (amended 1986).

203. On average, married individuals have significantly higher levels of life satisfaction than those who are single, dating, or cohabitating. See Judith P.M. Soons & Aart C. Liefbroer, *Together is Better? Effects of Relationship Status and Resources on Young Adults' Well-Being*, 25 J. SOC. & PERS. REL. 603, 615 (2008).