

UCLA

UCLA Criminal Justice Law Review

Title

Implicit in Liberty: The Spousal Communications Privilege in New Mexico

Permalink

<https://escholarship.org/uc/item/65k6v611>

Journal

UCLA Criminal Justice Law Review, 9(1)

Author

Beauchamp, Scott

Publication Date

2025

DOI

10.5070/CJ89165588

Copyright Information

Copyright 2025 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at <https://escholarship.org/terms>

Peer reviewed

IMPLICIT IN LIBERTY: The Spousal Communications Privilege in New Mexico

Scott Beauchamp

Abstract

In *State v. Gutierrez*, the New Mexico Supreme Court became the first high court in the United States to abolish the spousal communications privilege, declaring it a “procedural rule which has outlived its justification.” In doing so, the court rejected both utilitarian and humanist rationales long used to defend the privilege, departing from centuries of Anglo-American legal tradition and the practices of every other U.S. jurisdiction. This Article critically examines that decision and its constitutional, philosophical, and jurisprudential consequences.

The court’s utilitarian analysis treats the privilege as an instrumentally ineffective deterrent to spousal testimony, arguing it protects communications that would occur even without its existence. But this logic, adapted from professional privileges such as attorney-client confidentiality, misunderstands the privilege’s function as a protection of personal rather than procedural integrity. Moreover, the court’s “humanistic” dismissal of marital autonomy and intimacy as mere sentiment ignores the constitutional dimensions of privacy and liberty embedded in the marriage relationship. Drawing on theorists such as Milton Regan, D.C. Schindler, and Hegel, this Article reframes the privilege not as an evidentiary anomaly, but as a legal expression of relational self-authorship—a dimension of human dignity protected by substantive due process.

In response, this Article advances a normative and constitutional defense of the spousal communications privilege. It argues that the privilege safeguards a constitutionally protected sphere of intimate autonomy recognized since *Griswold v. Connecticut* and reaffirmed in *Obergefell v. Hodges*. Further, it contends that the logic underlying these cases calls not for the contraction but for the *expansion* of non-professional privileges to similarly profound relationships. Rather than being a sentimental relic, the spousal communications privilege is a vital legal recognition of the communal nature of personhood and an indispensable component of the administration of justice in a free society.

About the Author

Scott Beauchamp is a criminal defense attorney, mediator, and writer whose work has appeared in *American Affairs*, *The Atlantic*, *The Paris Review*, and *The New Criterion*. He received his B.A. from the University of Maine and his J.D. from the University of New Mexico School of Law. He would like to thank Professor Laura Gómez and Emma Walters for their support and encouragement.

Table of Contents

INTRODUCTION 94

I. UTILITARIAN ARGUMENTS FOR AND AGAINST THE SPOUSAL COMMUNICATIONS PRIVILEGE 98

 A. *The Privilege Generally*..... 98

 B. *The Court’s Utilitarian Analysis* 100

 C. *A Response to the Court’s Utilitarian Analysis* 102

II. HUMANIST ARGUMENTS AGAINST THE COURT’S UTILITARIAN ANALYSIS..... 104

 A. *The “Internal” View of Marriage and Communal Identity*.... 104

 B. *The Court’s Humanist Critique* 105

 C. *A Constitutional Response to the Court’s Critique*..... 106

CONCLUSION: NON-PROFESSIONAL PRIVILEGES SHOULD BE EXPANDED... 109

Introduction

Soon after their marriage in 2002, Nicole Cordova told her husband, David Gutierrez II, that as a teenager she had been repeatedly raped by her uncle.¹ This admission is the very sort of intimate confession one might expect to occur within the bounds of privacy implicit in marriage, the inviolability of which the U.S. Supreme Court has explicitly acknowledged since at least 1885.² After Cordova’s tragic disclosure, Gutierrez told her “not to worry about anything anymore.”³ Four months later, Gutierrez entered the boxcar home of Cordova’s uncle and shot him in the head with a shotgun, killing him.⁴ Upon returning to his wife, a visibly shaken Gutierrez told her that he “took

1. State v. Gutierrez, 482 P.3d 700 (2019).

2. Cannon v. United States, 116 U.S. 55, 72. In this case, the Supreme Court recognized the right to privacy within marriage (the case turned on the definition of “cohabitation”): “Nor, on the other hand, does the statute pry into the intimacies of the marriage relation. But it seeks not only to punish bigamy and polygamy when direct proof of the existence of those relations can be made, but to prevent a man from flaunting in the face of the world the ostentation and opportunities of a bigamous household, with all the outward appearances of the continuance of the same relations which existed before the act was passed; and without reference to what may occur in the privacy of those relations.”

3. Gutierrez, 482 P.3d at 713.

4. Id. at 703.

care of it”⁵ and brought her to the scene of the crime, where Cordova saw the corpse of her uncle lying face down on the floor.⁶

Whether Gutierrez’s murder confession falls within the same scope of marital privacy as Cordova’s disclosure of her uncle’s abuse is an ambiguous and controversial question. Whether the legally recognized spousal communications privilege applies to both, however, seems cut and dry. Under New Mexico statute, spouses are not compelled to disclose any communication made between one another during their marriage in both criminal and civil proceedings.⁷ The spousal communications privilege is among the few recognized testimonial privileges recognized in the United States⁸ and alongside attorney-client privilege is the oldest privilege in the Anglo-American legal system.⁹ Historically, privileges “signify the weight society imputes upon certain relationships by insulating [people in] these special relationships from being compelled to testify in court.”¹⁰ As the U.S. Supreme Court has noted, the spousal communications privilege reflects a recognition of the trust and confidence necessary to a functioning marriage.¹¹ It is a privilege essential to the administration of justice,¹² firmly embedded in the legal system,¹³ and recognized nationwide by both state and federal governments.¹⁴

5. *Id.* at 704.

6. *Id.*

7. N.M. Stat. Ann. § 38–6–6 (2021). “A. No husband shall be compelled to disclose any communication made by his wife during the marriage, and no wife shall be compelled to disclose any communication made to her by her husband during the marriage. B. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney’s secretary, stenographer or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity. C. In the courts of the state, no certified public accountant or public accountant shall be permitted to disclose information obtained in the conduct of any examination, audit or other investigation made in a professional capacity, or which may have been disclosed to said accountant by a client, without the consent in writing of such client or his, her or its successors or legal representatives. D. If a person offers himself as a witness and voluntarily testifies with reference to the communications specified in this section, that is a consent to the examination of the person to whom the communications were made as above provided.”

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

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

10. Emily Crawford Sheffield, *Rationalizing a Spousal Confidential Communications Privilege Fit for the Twenty-First Century*, 74 *VAND. L. REV. EN BANC* 187, 191.

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

12. *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, 411 (D. Del. 1992) (In which the court observed that privileges “serve important values in the observance of law and the administration of justice.”).

13. *Beller ex rel. Beller v. United States*, 221 F.R.D. 679, 681 (D.N.M. 2003) (“The marital communications privilege is a highly regarded and well established privilege.”).

14. Katharine T. Schaffzin, *Beyond Bobby Jo Clary: The Unavailability of Same-Sex Marital Privileges Infringes the Rights of So Many More Than Criminal Defendants*, 63 *U. KAN. L. REV.* 103, 113 (2014) (“All state and federal jurisdictions in the United States recognize the confidential marital communications privilege in some form.”).

Nevertheless, Gutierrez's confession of his crime, both to Cordova and later to his second wife, became the central issue before the New Mexico Supreme Court.¹⁵ After Cordova initially lied to investigating officers about Gutierrez's admission and what she had witnessed (possibly because he had threatened her life if she told anyone), she eventually confessed the truth prior to the trial.¹⁶ Gutierrez also confessed the murder to his second wife, Evelyn Franco.¹⁷ Cordova and Franco both testified against Gutierrez at trial, where he was found guilty of first-degree murder and sentenced him to life imprisonment plus one year.¹⁸

Gutierrez appealed directly to the Supreme Court of New Mexico, arguing, among other things, that there had been a violation of his spousal communications privilege at trial.¹⁹ The court ruled against him, finding that although the spousal communications between Gutierrez and Cordova had indeed been privileged, their admission at trial was a harmless error.²⁰ The court affirmed the district court's admission of the communication between Gutierrez and Franco, as Gutierrez had failed to prove by a preponderance of the evidence that they had been legally married at the time the confession was made.²¹ This might have been a conventional, even anodyne murder case. Instead, the court took one further step which makes *State v. Gutierrez* one of the most striking rulings in New Mexico history: it proscriptively abolished the spousal communications privilege.²²

In abolishing the spousal communications privilege, *Gutierrez* court broke with not only every other state,²³ but also with federal courts,²⁴ and the U.S. Supreme Court.²⁵ The New Mexico Supreme Court explained this radical move by articulating two rationales for the privilege and then rejecting each in turn.²⁶ The first was dubbed a "utilitarian" rationale by the author of the decision, Chief Justice Judith Nakamura.²⁷ The utilitarian rationale asks if the privilege works the way it is intended to in order to achieve its specified goals.²⁸ The court referred to the second rationale it rejected as a

15. *Gutierrez*, 482 P.3d at 704.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 714.

21. *Id.*

22. *Id.* at 703.

23. *Id.* at 721 (Vigil, J., concurring in part, dissenting in part).

24. *United States v. Neal*, 532 F. Supp. 942, 946 (D. Colo. 1982) ("Over at least the past decade, the circle of privacy surrounding each of us has drawn smaller with each new governmental incursion and each new technological advance. Courts have sought to preserve inviolable some small island of privacy as a refuge for the human spirit where government may not intrude.").

25. *Trammel*, 445 U.S. at 51.

26. Edward J. Imwinkelried, *State v. Gutierrez Abolishing the Spousal Communications Privilege: An Opinion Raising Profound Questions About the Future of Evidentiary Privileges in the United States*, 53 N.M. L. REV. 71, 71 (2023).

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

28. *Id.*

“humanistic” rationale.²⁹ According to this justification, it is incumbent upon the government to proactively protect “certain fundamental relationships” vital to personal autonomy.³⁰ Personal autonomy is itself recognized as an “ultimate value” in a “democratic society” and a freedom which sustains the fundament of our entire political system.³¹ This defense of the privilege has a strong constitutional basis (in its decision the court almost offhandedly references *Griswold v. Connecticut*)³² but was ultimately rejected by Nakamura as “little more than soaring rhetoric.”³³ Along its path towards abolishing the privilege, the court also mentions certain privacy concerns (that are ultimately disregarded) implicated by its decision,³⁴ as well as concerns about the privilege having a disproportionately negative effect on women.³⁵ After making its calculations, the court ultimately reached the conclusion that the spousal communications privilege is “a procedural rule which has outlived its justification.”³⁶

This result is troubling, and not only because of the issues raised by abolishing the privilege via judicial fiat.³⁷ The majority opinion in *Gutierrez* fundamentally misunderstands the complex nature of marriage dynamics. Specifically, the court blinds itself to the nuanced tension between the individual and the communitarian goals inherent in the marriage compact. In his book *Alone Together*,³⁸ family law scholar Milton Regan describes these two opposing, but ultimately complimentary aspects of the marriage compact as “internal” (individual) and “external” (shared or communitarian) qualities of the marriage bond.³⁹ He writes that, though the external and internal positions of marriage might ultimately be irreconcilable:

Each stance offers its own account of personal identity and of the claims and obligations that arise in human relationships. In the course of everyday life, spouses move back and forth between these stances, seeking to balance their status as separate individuals with their roles as members of a marital community.⁴⁰

29. *Id.* at 707.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 710.

34. *Id.* at 707.

35. *Id.* at 709; see also Sec. I below.

36. *Id.* at 711.

37. *Id.* at 722. (Vigil, J., dissenting) (“To abolish the spousal communications privilege in this opinion is imprudent for three reasons. First, the parties did not raise the issue for our review. Second, the continued viability of the spousal communications privilege is not determinative of the Court’s conclusion affirming Defendant’s convictions. Finally, the more sensible method to determine whether to abolish the spousal communications privilege is to refer the matter to the Rules of Evidence Committee for further study and recommendation to this Court.”).

38. MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANING OF MARRIAGE* (1st ed., 1999).

39. *Id.* at 5.

40. *Id.*

In this Article, I argue that what the court in *Gutierrez* dismisses as mawkishness is actually the constitutionally recognized fundamental right to self-authorship which “[t]he substate family unit enjoys . . . in a free society.”⁴¹ The freedom of these relationships from state interference is recognized as a natural “extension of [the] personal autonomy” of the individual spouses which comprise the marriage unit.⁴² The U.S. Supreme Court has recognized the limits substantive due process places on governmental abuse of power, particularly when infringing upon rights “rooted deeply in this Nation’s history and tradition.”⁴³ The Court has also clearly articulated a need to develop an understanding of fundamental rights which, although not necessarily arising from our deep shared social history, nevertheless are “implicit in the concept of ordered liberty”⁴⁴ as predicated upon our constantly developing sense of freedom and human dignity.

Part I of this Article discusses the nature and history of privileges generally before focusing on the spousal communications privilege specifically. I illustrate how the court in *Gutierrez* mischaracterizes both how the privilege functions and the goals it is meant to achieve. In doing so, I demonstrate why it is inappropriate to compare this non-professional privilege to other privileges based around professional or legal relationships.

Part II of this Article discusses how the court’s “humanistic” evaluation of the spousal communications privilege dramatically misunderstands the complex matrix between freedom and identity in the marriage compact itself. Regan’s “internal” notion of marriage, in Hegelian terms, suggests that we understand the act of marriage as one of ultimate autonomous freedom in which individuals create the conditions for the transcendence of atomistic selfhood. Marriage exemplifies this freedom. According to D.C. Schindler, marriage is an act of self-determination “in which we limit ourselves by binding ourselves to another but come to know ourselves through this limitation.”⁴⁵ Finally, I conclude by suggesting ways in which this logic of self-authorship can be applied to other modes of kinship, ultimately advocating for an expansion of spousal communications privileges to relationships equally as profound as marriage.

I. Utilitarian Arguments For and Against the Spousal Communications Privilege

A. *The Privilege Generally*

In their most basic sense, evidentiary privileges exist to prevent potential witnesses from disclosing evidence or specific types of information. Dean

41. Imwinkelried, *supra* note 26, at 93.

42. WRIGHT & GRAHAM, *supra* note 8, at 773.

43. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

44. *Obergefell v. Hodges*, 576 U.S. 644, 698 (2015) (Roberts, J., dissenting).

45. D.C. Schindler, “*The Free Will Which Wills the Free Will*”: *On Marriage as a Paradigm of Freedom in Hegel’s “Philosophy of Right”*, 44 THE OWL OF MINERVA 93 (2012).

John Henry Wigmore, among the most esteemed authority on privileges, identified four conditions he considered essential to the recognition of a privilege:

2. The communication must originate in a confidence that they will not be disclosed.
3. This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between parties.
4. The relationship must be one that in the opinion of the community ought to be sedulously fostered.
5. The injury that would inure to the relationship by the disclosed must be greater than the benefit thereby gained for the correct disposal of litigation.⁴⁶

The crux of privileges, what makes them valuable, is that society has determined that protecting the confidential nature of certain relationships outweighs testimonial obligation.⁴⁷ Society in this context refers to the genealogy of common law from which evidentiary privileges are derived. Rule 501 of the Federal Rules of Evidence characterizes evidentiary privileges accordingly:

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.⁴⁸

This definitional statement implies that courts are to evaluate privileges in a historical context and with a consideration for reasonable contemporary application.⁴⁹ Ironically, this Janus-faced justification has been used both as a defense as well as a critique of spousal privileges.⁵⁰ The so-called “argument from antiquity” says that because the privilege has been with us so long, evolving into Anglo-American common law from Roman code⁵¹, it must serve a valuable purpose.⁵² The “argument from modernity”, however, assumes that because the privilege is so ancient it must be an anachronism serving no valuable contemporary purpose.⁵³ If overemphasized, the “argument from modernity” inevitably leads one to dismiss the spousal privilege out of hand as a “sentimental relic” of a time long passed, obviating deeper analysis of how marriages and their associated privilege function in the contemporary world.⁵⁴

46. JOHN HENRY WIGMORE, *WIGMORE ON EVIDENCE: EVIDENCE IN TRIALS AT COMMON LAW* § 2285 (Arthur Best ed., 4th ed., 1985).

47. Imwinkelried, *supra* note 26, at 72.

48. FED. R. EVID. 501

49. WRIGHT & GRAHAM, *supra* note 8.

50. *Id.*

51. Michael D. Moberly, *Am I My Brother's Secret-Keeper? Contemplating the Recognition of a Sibling Testimonial Privilege*, 41 AM. J. TRIAL ADVOC. 239 (2017).

52. WRIGHT & GRAHAM, *supra*, note 8.

53. *Id.*

54. Comment, U.R.E. 23(2).

It should be noted that spousal communications privilege has changed since coming to us from Anglo-American common law,⁵⁵ developing parallel to judicial ability to compel witness testimony.⁵⁶ Historically, it was one of the few common law privileges.⁵⁷ This continues to be true today, which is why the creation of new privileges tends to arise as a function of the legislature.⁵⁸

Another result of the development of spousal privileges was the bifurcation of what was once a single privilege into two distinct, though occasionally interrelated, privileges. It is important to note the distinction between the spousal communications privilege and the adverse testimony privilege. The adverse testimonial privilege only applies in criminal cases,⁵⁹ lasts only as long as the marriage,⁶⁰ and the privileged testimony itself *must* be adverse to the defendant-spouse.⁶¹ The spousal communications privilege, the focus of the court in *Gutierrez* and the only spousal privilege recognized in New Mexico, can be applicable in both civil and criminal trials,⁶² applies to any private communication during the marriage (even if the relationship has been subsequently dissolved),⁶³ and can be applied beyond merely adverse statements to also include any communications made during marriage which carry the expectation of privacy.⁶⁴

B. *The Court's Utilitarian Analysis*

The New Mexico Supreme Court's appraisal of the spousal communications privilege utility centers around Wigmore's criteria for whether a privilege should be recognized.⁶⁵ Wigmore himself was a devotee of the evidentiary

55. Moberly, *supra*, note 51 at 239.

56. See *United States v. Gecas*, 120 F.3d 1419, 1441 (11th Cir. 1997) (“[A]ll nonparty witness testimony was voluntary until the mid-sixteenth century.”).

57. Jeffrey J. Lauderdale, *A New Trend in the Law of Privilege: The Federal Settlement Privilege and the Proper Use of Federal Rule of Evidence 501 for the Recognition of New Privileges*, 35 U. MEM. L. REV. 255, 260 (2005).

58. *Harris v. One Hope United, Inc.*, 2 N.E.3d 1132, 1135 n.2 (“Most of the commonly used privileges are statutorily created.”). Nevertheless, change has occurred through the courts as well. What came to us from common law as a privilege that considered one spouse incompetent to testify for or against another was transformed by the U.S. Supreme Court in 1933 to permit a witness spouse to testify in favor of a spousal defendant. In 1980, the Court held that the witness-spouse may choose to testify adversely if they so wished. Other such changes, and their pragmatic value in a purely utilitarian sense, will be discussed in the following section: See *Funk v. United States*, 290 U.S. 371 (1933) & *Trammel v. United States*, 445 U.S. 40 (1980).

59. SUSAN W. CRUMP & PAUL F. ROTHSTEIN, *FEDERAL TESTIMONIAL PRIVILEGES: EVIDENTIARY PRIVILEGES RELATING TO WITNESSES & DOCUMENTS IN FEDERAL-LAW CASES* 272 (2nd ed., 2003). Although there is a single exception in which the privilege might be applied in a civil fraud case where criminal prosecution is likely to follow; *Id.* at 275.

60. *United States v. Merksick*, 2019 WL 6255807 (D. Neb. 2019).

61. CRUMP & ROTHSTEIN, *supra* note 59, at 275.

62. *Id.* at 295.

63. Sheffield, *supra* note 10, at 193 (Noting also that the privilege does not extend to common law marriages or bigamous relationships).

64. CRUMP & ROTHSTEIN, *supra* note 59, at 275.

65. *Id.* at 79.

theories of Jeremy Bentham,⁶⁶ who argued (in his typical acerbic style) that most exclusionary rules were “rubbish.”⁶⁷ In opposition to the historical justifications for privileges, Bentham believed that the end objective of judicial procedure was rectitude of decision.⁶⁸ By that logic, Bentham elevated the truth-seeking function of the trial above the justice-seeking function of the legal system as a whole. The majority in *Gutierrez* adopts this logic as its own starting point,⁶⁹ stacking the deck against the privilege from the outset. It does this by creating a hostile standard, unsuited to a non-professional privilege, the controlling criteria by which it is appraised. As I elaborate further below, professional testimonial privileges, such as those which exist between attorneys and their clients or doctors and their patients, implicate different policy justifications than non-professional privileges like the spousal communications privilege. Professional privileges exist in order to facilitate effective legal and medical (i.e. professional) services.⁷⁰ Non-professional privileges, on the other hand, express a societal interest in preserving privacy in intimate interpersonal spheres.⁷¹

It is against this philosophical backdrop that the court in *Gutierrez* claims that the traditional justification for the spousal communication privilege is “considered to be an instrumental or utilitarian rationale.”⁷² By this, the court means whether the privilege acts to protect a public good (the marital relationship)⁷³ while simultaneously adhering to the narrow criteria articulated by Wigmore.⁷⁴ According to Wigmore’s standard, the privilege can only be said to function appropriately when spouses are aware that the privilege exists, and this awareness plays a major role in spouses deciding whether or not to confide in one another.⁷⁵ The majority in *Gutierrez* concluded it likely “that most people are entirely unaware of the privilege”⁷⁶ and therefore do not rely on it for intimate marital communication.⁷⁷ Drawing deeply on principles outlined in McCormick’s treatise on evidence, the majority went on to reason that it is more likely spouses communicate openly with one another because of the inti-

66. *Id.* at 80.

67. JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM: RATIONALE OF JUDICIAL EVIDENCE 479 (John Bowring ed., 1827).

68. *Id.* at 477.

69. *Gutierrez*, 482 P.3d at 704 (“Limitations on this fundamental rule shall be recognized ‘only to the very limited extent that permitting a refusal to testify or excluding relevant evidence’ produces a ‘public good’ that transcends ‘the normally predominant principle of utilizing all rational means for ascertaining truth.’”).

70. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. L. INST. 2000)

71. For how non-professional privileges serve a purpose other than protection professional or institutional relationships, see 5 STEPHEN A. SATLZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 501 (12th ed., 2022).

72. *Id.*, ¶ 15.

73. *Id.* (citing *Stein v. Bowman*, 38 U.S. 209, 223 (1839) justifying a theory that a privilege is only recognized if it is an essential instrumental means of protecting a socially important relationship).

74. Imwinkelried, *supra* note 26, at 81.

75. *Id.* at 75.

76. *Gutierrez*, 482 P.3d at 708.

77. *Id.* at 708–09.

mate nature of the relationship itself, and not because of reliance on a privilege shielding their “communications from future disclosure in court.”⁷⁸ Because of this, the majority found the privilege over-inclusive in that it “extends protection to many statements that the spouses would make even if there were no privilege.”⁷⁹

Although the court includes a recognition of the disparate impact use of the privilege has on women in its “humanistic” analysis,⁸⁰ it seems just as well-suited to consider the issue alongside the analysis of utility, relying as it does on a justification for the spousal communications privilege according to the unintended consequences of how it functions. As the majority notes, nearly all spousal privilege cases involve wives testifying against husbands.⁸¹ Additionally, although feminist scholars have attacked the privilege as “an excuse to isolate the family from interference by the state,”⁸² there nonetheless remain instrumental defenses in favor of the privilege in practice as well as more profound philosophical defenses of the privilege in the context of freedom of communal self-authorship both of which are left unaddressed by the court.

C. *A Response to the Court’s Utilitarian Analysis*

The court’s criticism of the spousal communications privilege relies in large part on the notion that most non-legal professionals are unaware of the privilege. As such, it is curious that no evidence is presented to back up the claim. While it is true that with testimonial privileges which center around working relationships between “civilians” and professionals, clients rely on professionals to advise them of the existence of privileges and how they function, the existence of these professional standards does not automatically suggest that spouses lack awareness of the privileged nature of their relationship.⁸³ The popularity of television shows such as *The Sopranos*⁸⁴ and *Law & Order*⁸⁵ surely has contributed to a wider cultural awareness of the privilege among the general public.⁸⁶ Ironically, media coverage of the *Gutierrez* case itself might have contributed to this expanding consciousness, particularly in New Mexico.⁸⁷

78. *Id.*

79. Imwinkelried, *supra* note 26, at 76.

80. *Gutierrez*, 482 P.3d at 710 (positing the argument that because it is typically women acting as the spouse-witness and husband as defendant, the privilege benefits men to the detriment of women who might be coerced into invoking the privilege).

81. *Id.*

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

83. WRIGHT & GRAHAM, *supra* note 8, at 23.

84. *The Sopranos: Watching Too Much Television* (HBO television broadcast October 27, 2002).

85. *Law & Order: Spousal Privilege* (NBC television broadcast November 19, 2014).

86. WRIGHT & GRAHAM, *supra* note 8, at 23.

87. See Edmundo Carillo, *New Mexico Supreme Court Reinstates Spousal Privilege Over Objection of Ex-Chief Justice*, ALBUQUERQUE J., (Nov. 9, 2020), [<https://perma.cc/GTB8-4479>]; Eugene Volokh, *N.M. Abolishes Marital Communication Privilege, Based in Large Part on Feminist Arguments*, Reason Magazine, (Sept. 14, 2019), [<https://perma.cc/2H32-UH68>].

Setting the issue of awareness aside for a moment, it should be recognized that “reliance” functions differently in the context of spousal communications compared to professional privileges. Instead of protecting an expectation of privacy in the instrumental pursuit of some other good (be it therapy or legal representation), the spousal communications privilege instead protects the privacy “that inheres in the very concept of marriage.”⁸⁸ In other words, the privilege functions to protect an intimacy which already exists within the relationship, rather than to generate privacy within a professional relationship. In marriage, intimacy *is* the relationship.⁸⁹ A possible explanation for this mischaracterization are the “statist” assumptions the Court takes regarding the privilege via Wigmore.⁹⁰ By beginning with an assumption in favor of testimony, and then by shoehorning the privilege into a narrow set of criteria more appropriate for professional privileges, the deck is stacked against the privilege passing a utilitarian test. What is lost in Wigmore’s narrow test is the notion that “the administration of justice was made for society, not society for the administration of justice.”⁹¹

On the subject of utility, it should be noted that Justice Barbara Vigil’s dissent in *Gutierrez* addresses some of the majority’s concerns regarding the practical use of the spousal communication privilege. Emphasizing the distinction between the testimonial and communications privileges,⁹² Vigil reminds us that the latter does not act as a complete bar to testimony.⁹³ Furthermore, exceptions to the privilege exempt its use in cases in which one spouse is charged with a crime against the other or a child of either.⁹⁴ As such, a spouse would necessarily waive the privilege in a case of domestic violence. It should also be said that what qualifies as “communication” itself is narrowly tailored.⁹⁵ “The mere fact that the act or conduct was performed privately and in the presence of the other spouse” writes Susan Crump, “does not alone make it a communication . . .”⁹⁶ Another limit to the privilege is that it is nullified by disclosures to third-party persons (excluding eavesdroppers and very young children).⁹⁷ These limits on the privilege should serve to allay fears of its abuse and enhance its practical applicability.

Contemporary feminist scholarship has also acknowledged, contrary to the court’s depiction of the nature and use of the privilege, that the spousal communications privilege exists primarily for the benefit of the witness-spouse and not the defendant.⁹⁸ Essentially, it exists “to protect him

88. WRIGHT & GRAHAM, *supra* note 8, at 21.

89. See Sec. II below for an argument in favor of safeguarding the inherent value of such a relationship.

90. Sanford Levinson, *Testimonial Privileges and the Preference of Friendship*, 33 DUKE L. J. 4, (1984).

91. Wigmore, *supra* note 46, at 215 (quoting William Evarts).

92. *Gutierrez*, 482 P.3d at 721–22 (Vigil, J., concurring in part).

93. Rule 11–505 NMRA.

94. *Gutierrez*, 482 P.3d at 721–22.

95. CRUMP & ROTHSTEIN, *supra* note 59, at 295.

96. *Id.* at 296.

97. *Id.* at 300.

98. Amanda H. Frost, *Updating the Marital Privileges: A Witness-Centered Rationale*, 14

or her from the sanctions our legal system uses to force reluctant witnesses to testify truthfully in a court of law.”⁹⁹ In light of these qualifications, the disparate impact of the privilege mentioned by the court appears less ominous.

II. Humanist Arguments Against the Court’s Utilitarian Analysis

To begin, it should be acknowledged that drawing a bright line between “utility” and “humanistic” concerns might itself be a method of obscuring the true value of the privilege. In his magisterial *Alone Together*, Regan bifurcates the experience of marriage into two categories: external and internal.¹⁰⁰ In the external view, one reflects upon their marriage commitments as an individual, considering in an almost cost-benefit analysis whether the demands and rewards of the relationship are commensurate and whether the relationship serves their needs as a “distinct individual.”¹⁰¹ As such, it carries many of the same assumptions as the utilitarian defenses of the spousal communications privilege, concerned as both are with things such as function, output, consent, and operation. However, as Regan points out, most of us also have another, “internal”, experience of marriage in which our identities are bound up communally within the marriage unit.¹⁰² It is from within this internal view of marriage that real intimacy is experienced. And while the external view of marriage might appeal more to modern attitudes towards consent and autonomy,¹⁰³ the internal position is necessary for true connection and intimacy. More than that, the internal experience of marriage provides an opportunity for what some consider the supreme act of self-authorship: creating an identity which is, at least in part, constituted by a relationship.¹⁰⁴ Perhaps for the justice system to respect the totality of human dignity, both aspects of the marital bond must be acknowledged and respected, and the tensions between the two mitigated as best as possible. Indeed, the argument can be made that our Constitution does just that.

A. The “Internal” View of Marriage and Communal Identity

As mentioned above, Regan’s internal view of marriage refers to one’s ability to take the relationship as a given “without reference to individual cost and benefit.”¹⁰⁵ Implicit in Regan’s dichotomy is the phenomenological fact that people often experience marriage in both the internal and external way simultaneously, in a kind of double-vision.¹⁰⁶ This might necessarily be so in a modern marriage in the contemporary world, in which our desire to preserve autonomy is balanced against our craving a cure for isolation.

WIS. WOMEN’S L. J. 1, 5 (1999).

99. *Id.*

100. Regan, *supra* note 38, at 5.

101. *Id.*

102. *Id.* at 11.

103. *Id.* at 17.

104. *Id.* at 25.

105. *Id.* at 24.

106. *Id.* at 29.

Regan's formulation implicitly shares many characteristics with Hegelian notions of freedom, identity, and marriage. Essentially, Hegel's conception of freedom was communal,¹⁰⁷ belonging to a person "specifically in his relation to others."¹⁰⁸ Accordingly, in *The Philosophy of Right*, Hegel describes a "we-ness" which comes to exist when we enter into a profound relationship with another as something unique from both the individual identity as well as the sum of the individuals as isolated units.¹⁰⁹ It is this Hegelian shared identity which, D.C. Schindler tells us, "one has in mind when one talks, for example, about doing a particular thing 'for our relationship'."¹¹⁰ The important thing to note is that, for Hegel, the relationship itself constitutes a unique identity, separate from an isolated individual's self-conception.¹¹¹ "Seen in this light," writes Schindler, "the exchange of marriage vows can be interpreted as an act of reciprocal self-communication."¹¹²

What makes Regan and Hegel's notions of the marital identity so vital to this discussion is the stark contrast they offer with the more plainly two-dimensional notion of marriage offered by the court. In fact, the court defines the word it uses to describe the non-instrumental rationales of the privilege—"humanistic" theories—as based on the defense of an "autonomy"¹¹³ which it considers "personal."¹¹⁴ And while this is true in a sense, Regan's bifurcation of "external" and "internal" views of marriage, and Hegel's emphasis on the formation of identity as a communal project, underscore an added complexity to profound human relationships which the court ignores.

B. *The Court's Humanist Critique*

What is most striking about the court's dismissal of the spousal communications privilege is the light touch it gives the strongest policy arguments for the privilege's continued existence. As Edward Imwinkelried explains, the court focuses on three humanistic defenses:

1. There is a natural moral repugnance at forcing one spouse to testify to another spouse's confidences.
2. Spouses are constitutionally entitled to a circle of privacy relatively free from governmental supervision or observation.
3. Spouses have a fundamental right to decisional privacy that enables them to make more intelligent, independent life preference choices.¹¹⁵

The natural moral repugnance argument comes from Wigmore.¹¹⁶ Because it focuses on neither the defendant nor spouse-witness, but instead on

107. Schindler, *supra* note 45, at 94.

108. *Id.* at 96.

109. *Id.* at 104.

110. *Id.*

111. *Id.* at 106.

112. *Id.* at 108.

113. *Gutierrez*, 482 P.3d at 708–09.

114. *Id.*

115. Imwinkelried, *supra* note 26, at 77.

116. WIGMORE, *supra* note 46, at 217.

an imagined, possibly straw-man public observer, the argument is one which the court easily trivializes as an “embarrassment” significantly outweighed by the court’s primary objective of obtaining evidence.¹¹⁷

Setting the second rationale dismissed by the court aside for a moment and skipping to the third, we see the majority at least nominally recognize privacy as a rationale which “carries significant weight.”¹¹⁸ Consisting of both “informational privacy”¹¹⁹ and “avoidance of unwarranted governmental intrusion,”¹²⁰ this is really a right to autonomy with a strong emphasis on the individual as understood in an atomistic, contractual sense. It emphasizes a right slightly deviated from consideration of the family unit as a single entity and instead focuses on the privacy rights of the individuals involved in the relationship themselves.¹²¹

Another defense of the privilege as a privacy right the court acknowledges is a general constitutional right to privacy within marriage recognized by the New Mexico Supreme Court.¹²² Despite invocation of *Griswold v. Connecticut*¹²³ lending some legitimacy to the notion of a “circle of privacy”¹²⁴ protecting marriages from governmental observation, the court is ultimately unpersuaded by these privacy rights arguments.¹²⁵ Instead, the majority quotes Edmund Morgan in characterizing these arguments as amounting to “mere sentiment.”¹²⁶ And being merely sentiment, the court reasons, these humanistic arguments do not “justify interference with the courts’ truth-seeking function.”¹²⁷

C. A Constitutional Response to the Court’s Critique

Despite the court’s strident dismissal of privacy concerns summarized above, it is not clear that the court wrestles with the privacy issue long or arduously enough to discover its true value. Mere mention of *Griswold* is not the most compelling articulation of what the case signifies. The argument in favor of the spousal communication privilege is particularly strong in light of the due process right to privacy,¹²⁸ especially if one keeps in mind both Regan’s

117. WRIGHT & GRAHAM, *supra* note 8, at 12.

118. Gutierrez, 482 P.3d at 707.

119. *Id.*

120. *Id.*

121. Imwinkelried, *supra* note 26, at 96. (This is most distinguishable from the relationship as a coherent single entity in the context of consultation within the marriage regarding things like medical decisions: “Society’s legal system can adopt measures to enable the individual to trust that, in the process of consulting, his or her autonomy and independence will not be compromised. One such measure is creating an evidentiary privilege for consultations in constitutionally protected areas of decision-making, such as family choices.”).

122. Gutierrez, 482 P.3d at 707.

123. 381 U.S. 479, 485–86 (1965).

124. Imwinkelried, *supra* note 26, at 77.

125. Gutierrez, 482 P.3d at 709.

126. *Id.* (citing Edmund M. Morgan, *Forward*, to Model Code of Evidence at 5 (Am. L. Inst. 1942)).

127. *Id.*

128. And the right against self-incrimination. See WRIGHT & GRAHAM, *supra* note 8.

experiential accounting of the “internal” view of marriage and Hegel’s notion of communal self-authorship.

In *Griswold*, the U.S. Supreme Court sounded a theme which has been constantly reiterated throughout higher court case law: spouses share a “constitutionally protected realm of autonomy.”¹²⁹ Prior to *Griswold*, even as early as 1923, the Court specified that this autonomy included the rights to “marry, establish a home, and bring up children.”¹³⁰ In *Griswold*, Justice Douglas identified in his now-famous “penumbra” of rights suggested by the Bill of Rights the right of marriages to enjoy some semblance of privacy free from government intrusion.¹³¹ Avoiding language as rich as that used by Regan, or as sophisticated as that used by Hegel, Douglas describes a “bilateral loyalty” fostered by marriage.¹³² The insinuation is that this loyalty without the protections of “privacy and repose” would be wounded, perhaps mortally so.¹³³ The Court’s moral logic values the protection of this relationship above the prerogatives of the state. What is important to keep in mind about this case is that, despite its exoteric focus on reproduction, it was just as equally a “case about marriage than about reproductive freedom.”¹³⁴ Reproductive rights were sheltered under the auspices of marital privacy.

Even one hostile to the privilege acknowledges the strength of this constitutional privacy defense.¹³⁵ The issue was also raised by the Congressional Advisory Committee during its debate of the Rules of Evidence.¹³⁶ During the proceedings, Professor Charles Black argued the following:

It seems clear to me that [the Advisory Committee’s abolition of the marital communications privilege] trenches on the area of marital privacy so staunchly defended by the Supreme Court, especially by the late Mr. Justice Harlan’s concurrence, in *Griswold v. Connecticut*, certainly it is arguable that it does. Even if *Griswold* had never been decided, it would be an entirely viable contention that the “scheme of ordered liberty” sanctioned in much earlier cases forbade this nearly complete destruction of the privacy of marriage, in the interest of the conduct of ordinary litigation.¹³⁷

129. Imwinkelried, *supra* note 26, at 93.

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

131. See *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (Where Douglas avoids the phrase “substantive due process” in the decision itself as the Court was still recovering from its post-*Lochner* hangover).

132. *Id.* at 486.

133. *Id.* at 485.

134. Robert A. Sedler, *The Constitution and Personal Autonomy: The Lawyering Perspective*, 11 T.M. COOLEY L. REV. 773, 783 (1994).

135. Anne N. Deprez, *Pillow Talk, Grimbribbers and Connubial Bliss: The Marital Communication Privilege*, 56 INDIANA L.J. 121, 139–48 (1980).

136. WRIGHT & GRAHAM, *supra* note 8, at 21

137. 1 House Hearings 242 (letter of Professor Charles L. Black); Charles L. Black Jr., *Marital and Physician Privileges – Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 48 (1975).

While Black's argument was ultimately rejected by the committee, others have embraced it.¹³⁸ The authors of New York's evidentiary code, for instance, combine the logic of *Griswold* with a California Supreme Court holding¹³⁹ that therapist-patient privileges are constitutionally based, to reach the conclusion that communications privileges are mandated by the Constitution.¹⁴⁰ Courts in Colorado¹⁴¹ and Arizona¹⁴² have also been persuaded by the logic of the constitutional argument.

The constitutional protection of marital autonomy was reaffirmed with vigor by the U.S. Supreme Court in 2015's *Obergefell v. Hodges*.¹⁴³ Although the question literally addressed by the Court in *Obergefell* was whether same-sex couples enjoy the right to marry (or, perhaps more specifically, whether same-sex marriages *are* marriages), the case also implicated the nature of substantive due process itself.¹⁴⁴ Matthew R. Grothouse argues that, until *Obergefell*, the substantive due process right to privacy was construed to protect only rights "deeply rooted in this Nation's history and traditions."¹⁴⁵ *Obergefell* clarified the historical sweep of due process, arguing that it also implicates rights "implicit in the concept of ordered liberty."¹⁴⁶ In other words, when tackling the question of whether due process protects only rights which it has protected in the past, or whether it develops in parallel with our own society's definition of freedom, the Court said: both.¹⁴⁷ The Court ruled that marriage itself is "inherent in the concept of individual autonomy,"¹⁴⁸ and "supports a two-person union unlike any other in its importance to the committed individuals."¹⁴⁹ By relying on equal protection concerns, the Court in *Obergefell* applies this fundamental right to a class of people to which it has traditionally been denied.¹⁵⁰ One cannot help but

138. WRIGHT & GRAHAM, *supra* note 8, at 21.

139. *In re Lifschutz*, 467 P.2d 557 (1970).

140. Commentary, Prop. N.Y. Evid. Code § 1980, at 84.

141. *U.S. v. Neal*, 532 F. Supp 942, 946 (D. Colo. 1982), *aff'd* 743 F.2d 1441 (10th Cir. 1984).

142. *Ulibarri v. Superior Ct. in & for Cnty. of Coconino*, 909 P.2d 449, 453 (Ct. App. 1995).

143. *Obergefell*, 576 U.S. at 644.

144. Matthew R. Grothouse, *Implicit in The Concept of Ordered Liberty: How Obergefell v. Hodges Illuminates the Modern Substantive Due Process Debate*, 49 J. MARSHALL L. REV. 1021 (2016).

145. *Id.* at 1075; *Glucksberg*, 521 U.S. at 720–21.

146. *Griswold*, 381 U.S. at 500 (quoting Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

147. Grothouse, *supra* note 144, at 1063–64 (The Court relies on a "converging Clause" approach, blending due process and equal protection in articulating its response to the state's objections to same-sex marriage. The Court concluded that prohibiting same-sex marriage *both* irrationally prohibits the exercise of a protected liberty interests as well as irrationally discriminates against a specific class of persons).

148. *Obergefell*, 576 U.S. at 646.

149. *Id.* at 666.

150. *But see Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.").

hear echoes of Regan's internal position of marriage in the language of the majority.¹⁵¹ Is it not "implicit in the concept of ordered liberty" that a person might join into marital relations with another, and that union itself enjoy a high-level of autonomy free from governmental intrusion?

The logic which underlies *Obergefell* suggests another possible interpretation of the privacy defense of the spousal communications privilege: the right against self-incrimination. This is not as dramatic a leap as it might seem. The attorney-client privilege has occasionally been interpreted as an extension of the right not to incriminate oneself.¹⁵² Similar to an attorney, a testifying spouse is "being invited to permit the state to turn her into an informer against one to whom she has ties of loyalty, to use information acquired in one dyadic relationship to satisfy the demands of another."¹⁵³ In these terms, "privacy" is less a particular protection of an individual from governmental overreach than "a symbol of our determination to preserve the autonomy of the individual: what the individual knows or thinks is beyond the realm of governmental power."¹⁵⁴ This distinction, which might seem too fine at first glance, becomes more convincing in the context of Regan and Hegel. If our identities are in large part constituted communally through deep engagement in profound relations, it becomes strikingly clear how divulging intimate communications might seem like a betrayal of one's very self. Justice might demand that some balance be struck between our individual identities in the external positions towards marriage and the unique synthesis inherent in the internal position.

Conclusion: Non-Professional Privileges Should be Expanded

The current literature and case law suggests that courts are, and should be, moving in the opposite direction of New Mexico's Supreme Court in *Gutierrez* and are seriously considering the expansion of non-professional privileges to relationships other than legally recognized marriages.¹⁵⁵ Keeping the internal view of marriage, and the logic of *Obergefell* in mind, the argument can be made that the nature of the relationship between two people matters more substantively to the recognition of specific rights inherent in

151. See discussion *infra* Conclusion: Non-Professional Privileges Should be Expanded for how the logic of *Obergefell* can be applied to extend privacy privileges to other fundamentally important relationships.

152. Levinson, *supra* note 90, at 638 (Although eventually concluding that the analogy fails).

153. WRIGHT & GRAHAM, *supra* note 8, at 10.

154. *Id.*

155. Imwinkelried, *supra* note 26, at 89, 94 (defense of the spousal communications privilege not only mentions growing privacy concerns in society in general); (but also invoking Professor Joseph Raz's *The Morality of Freedom*, in which Raz argues liberal democracy is not only responsible for reflexively protecting an individual's privacy, but has a positive duty to actually "promote autonomy." Channeling Justice Brandeis in *Olmstead v. United States*, Raz claims that "government should not merely refrain from obstructing its citizens' pursuit of their personal visions of the good life; instead, government ought to endeavor to 'secure conditions favorable to the pursuit of happiness' by citizens making autonomous decisions and choices.").

that union than a certifying document from the state. Katherine M. Forbes, for instance, argues cogently for extending privileges to non-married cohabitating couples.¹⁵⁶ Although spousal privileges have long only applied to marriages recognized by the state,¹⁵⁷ the state has in other contexts developed methods of recognizing the rights of unmarried couples.¹⁵⁸ For instance, courts in California have held that nonmarried cohabitating couples could be liable to one another for financial support and might be required to support one another in the event of a break-up.¹⁵⁹ This implies some sort of unity within the bounds of the relationship itself which the state recognizes as imbued with discernable rights. Furthermore, in the realm of employment benefits, courts have recognized nonmarried relationships as “clearly within the ambit of [the marital status] provision.”¹⁶⁰ Certain rights of domestic partnerships have also been recognized in eviction proceedings¹⁶¹ and in providing protection from domestic abuse.¹⁶²

We may also consider whether testimonial privileges might not also extend to other, non-romantic relationships. Indeed, New York courts have recognized a wider familial communications privilege,¹⁶³ and the recognition of a child-parent privilege has had numerous advocates.¹⁶⁴ Pointing to studies which show that the sibling relationship is in many ways more psychologically fundamental than the spousal relationship,¹⁶⁵ Michael D. Moberly advocates for the need for a communications privilege between siblings.¹⁶⁶ And while an officially recognized privilege does not yet exist between siblings or parents

156. Katherine M. Forbes, *Time for a New Privilege: Allowing Unmarried Cohabitating Couples to Claim the Spousal Testimony Privilege*, 40 SUFFOLK U. L. REV. 887 (2007).

157. *See Cannon*, 116 U.S. at 56 (showing that this criterion has much to do with a history of state repugnance towards bigamy).

158. Forbes, *supra* note 156, at 894.

159. *Marvin v. Marvin*, 557 P.2d 106, 123 (Cal. 1976).

160. *Yamauchi v. Dep’t of Emp. Sec.*, 638 P.2d 1253, 156 n. 2 (Wash. 1982); *see also Alaska C. L. Union v. State*, 122 P.3d 781, 793–4 (Alaska 2005) (focusing more on equal protection but recognizing domestic partners as entitled to the same benefits as spouses).

161. Forbes, *supra* note 156, at 896.

162. Forbes, *supra* note 156, at 897 (noting that Ohio case law has long construed cohabitation as the defining characteristic of “couple” rather than a formal marriage).

163. *Under Seal v. United States*, 755 F. 3d 213, 219 n.6 (4th Cir. 2014) (“New York state courts have recognized a privilege against divulging private familial communications, with emphasis on the privacy of the family unit”); *see also* Norman Abrams, *Unpacking the Power of an Ante-Litigation Limitation on Consultation-for-Advice/ Treatment Evidentiary Privileges*, 21 QUINNIPIAC L. REV. 1089, 1126 (2003).

164. *See* Michael D. Moberly, *Children Should Be Seen and Not Heard: Advocating the Recognition of a Parent-Child Privilege in Arizona*, 35 ARIZ. L. J. 515 (2003); *see also* *In re Grand Jury*, 103 F.3d 1140, 1158 (3rd Cir. 1997) (Mansmann, J., concurring in part and dissenting in part) (acknowledges the “academicians and other legal commentators” who “virtually uniformly” favor incorporation of a parent-child privilege into the law).

165. William Wesley Patton, *The Status of Siblings’ Rights: A View into the New Millennium*, 51 DEPAUL L. REV. 1, 2 (2001).

166. Moberly, *supra* note 51, at 239.

and their children,¹⁶⁷ many are arguing for its expansion and courts are listening.¹⁶⁸ Certainly, New Mexico is alone in attempting to contract testimonial privileges.

The complexity of marriages (and familial dynamics generally), the safeguards and mechanisms concerning privilege already in place at trial, as well as the liberty interests implicated by substantive due process all suggest the need for an expansion of non-professional privileges rather than a contraction. In his dissent in *Jaffee v. Redmond*,¹⁶⁹ the case which established the psychotherapist-patient privilege, Justice Scalia acerbically commented:

When is it, one must wonder, that the psychotherapist came to play such an indispensable role in the maintenance of the citizenry's mental health? For most of history, men and women have worked out their difficulties by talking to, *inter alios*, parents, siblings, best friends, and bartenders – none of whom was awarded a privilege against testifying in court. Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be.¹⁷⁰

There is real wisdom resting beneath the surface of Justice Scalia's sarcasm. It recognizes the vital importance of our deepest bonds and the relationships our constitution recognizes as necessary to the full flourishing of our autonomy. If these relationships are approached too formulaically, as the court did in *Gutierrez*, we are left with an unbalanced rendering of human experience. Relationships are portrayed as two-dimensional phantoms of actual intimacy: merely contractual and ultimately unrealistic. Approached in a different register—one which both recognizes relationships for how they actually exist in the world and emphasizes their constitutional significance—and the spousal communication privilege appears necessary for the administration of justice in its fullest and most profound sense.

Perhaps not surprisingly, the New Mexico Supreme Court walked back its initial attack on the spousal communications privilege, ultimately reinstating its use and relegating the issue of its future use to a rules committee.¹⁷¹ And while the move is not the vigorous defense of the privilege one would hope to see, it is at least a welcomed corrective action. The majority in *Gutierrez* misjudged the utility of the privilege because it failed to recognize the profound nature of the marriage relationship—a profundity which is so vital to both intimacy and communal self-authorship that it implicates constitutional protections. When adjudged solely in the light of trial evidence, the true underlying purpose of the privilege is lost. It is not simply about protecting marriage but preserving the freedom and dignity which inure in our most

167. *Id.* at 332–33 (although Moberly calls the recognition of this privilege “inevitable”).

168. Patton, *supra* note 165 (where the footnotes cite numerous court rulings which acknowledge the scholarly push to expand privileges).

169. *Jaffee v. Redmond*, 518 U.S. 1 (1996).

170. *Id.* at 22 (Scalia, J., dissenting).

171. *Gutierrez*, 482 P.3d at 710.

intimate relationships. Seen in a richer context, imbued with the actual heft of lived experience, it is more easily argued that these privileges might better be expanded rather than constricted or erased altogether.